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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN

Petitioner

v.

SHELL OIL COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the federal Petroleum Marketing Practices Act permit inquiry into pretext and the reasonableness of a termination where, despite the franchisor's facial compliance with the termination provisions of the Act, the evidence suggests that the termination is ill motivated, arbitrary and discriminatory?

II. Is a leased service station a "service or facility" within the meaning of Section 2(e) of the Robinson Patman Act and Maryland's analog thereto?

LIST OF PARTIES

The parties to the proceeding below were petitioner, Francis George Hinkleman, and respondent, Shell Oil Company.

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PETITION FOR WRIT OF CERTIORARI

Francis George Hinkleman ("Hinkleman") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit which was entered on May 6, 1992, and the denial of petition for rehearing with suggestion for rehearing in banc, which was entered on July 28, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 962 F.2d 372 and is reprinted as Appendix A. The opinion of the United States District Court

for the District of Maryland dismissing Count II of the Amended Complaint is reprinted as Appendix B. The opinion of the District Court granting summary judgment on Count I is reprinted as Appendix C. The opinion of the District Court denying preliminary injunction is reprinted as Appendix D. The opinion of the Fourth Circuit denying Petition for Rehearing is reprinted as Appendix E.

JURISDICTION

The Court of Appeals entered judgment on May 6, 1992 and denied a petition for rehearing on July 28, 1992. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

I. THE PETROLEUMMARKETING PRACTICES ACT.

Section 102(b)(2)(C) of Subtitle I of the Petroleum Marketing Practices Act ("PMPA") [15 USC 2802(b)(2)(C)] provides:

> "For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:
>
> * * * *
>
> (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence —
>
> (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 USCS 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 USCS 2804(b)(1)]."

Section 102(c)(8) of the PMPA [15 U.S.C. 2802(c)(8) provides:

"As used in subsection (b)(2)(C), the term 'an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable' includes events such as —

* * * *

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled.

Section 101(13) of the PMPA [15 U.S.C. 2801(13)] provides:

"As used in this title:

* * * *

(13) The term 'failure' does not include —

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee."

II. THE MARYLAND ANTITRUST ACT.

Section 11-204(a)(5) of Md. Comm. Law Code Ann. ("CL") provides:

"Prohibited conduct. — A person may not:

* * * *

(5) Discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with

> or without processing, by contracting to furnish, furnishing or contributing to the furnishing of any service or facility connected with the processing, handling, sale or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms."

CL Section 11-201(g) of the Maryland Antitrust Act provides:

> "'Service' means any activity performed in whole or in part for the purpose of financial gain, and includes any sale, rental, leasing or licensing for use."

III. THE ROBINSON PATMAN ACT.

Section 2(e) of the Robinson Patman Act, 15 U.S.C. 13(e), provides in part that:

> "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

STATEMENT OF THE CASE

Petitioner is a former franchisee of Respondent, Shell Oil Company ("Shell"), who operated a Shell retail service station in Pasadena, Maryland. This case arose when Shell terminated Hinkleman's franchise because of his alleged "failure to pay in a timely manner when due all sums to which Shell was legally entitled."

A. THE PMPA CLAIM - COUNT I.

On March 23, 1990, believing that the termination was unlawful under the PMPA, Hinkleman sued Shell in the district court, seeking preliminary and permanent injunctions to prevent

the termination. When his request for a preliminary injunction was denied, Hinkleman vacated the service station premises and amended his complaint to seek damages under the PMPA for the wrongful termination.[1]

Hinkleman claimed that he had not failed to pay timely, because any late payments were nevertheless "timely" under the PMPA's standards[2] and because any slight payment delays were not "failures" under the PMPA because such delays were merely "technical or unimportant".[3] More importantly, however, Hinkleman claimed that he was singled out by Shell for disparate treatment, and that the termination of his franchise for technically late payments was a pretext used by Shell to rid itself of an unwanted dealer.

Discovery showed that at the time it terminated Hinkleman's franchise due to his tendering of several NSF checks which were promptly replaced, Shell was ignoring more serious payment violations by other dealers who owed Shell substantially more money for extended periods of time.[4] For

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[1] Subject mattter jurisdiction below was based on 15 U.S.C. 2805, 28 U.S.C. 1331 and pendant jurisdiction.

[2] Under the PMPA, a standard of "timely payment" is utilized. As the legislative history indicates, "[t]his standard is intended to permit evaluation of nonpayment or late payments in view of prevailing commercial or industry trade practices," S.Rep. No. 731, 95th Cong., 2d Sess. 15, *repr. in* 1978 U.S. Code Cong. & Admin. News 873 at 896.

[3] Under 15 U.S.C. 2801(13), the term "failure" excludes any failure that is only "technical or unimportant to the franchise relationship," or "any failure for a cause beyond the reasonable control of the franchisee."

[4] Hinkleman's was not a case of nonpayment, but was one of late payment. He argued that the evidence related to Shell's failure to take action against others who owed substantial amounts was directly relevant to Shell's own "industry trade practice", *see*, n.2, *supra*, in evaluating whether payments were "timely" and also whether any brief delay in making payment was only "technical or unimportant". The District Court rejected this argument, and decided the issue summarily.

example, there was deposition testimony by Shell's representative that another dealer was three (3) months behind in rent before a demand letter was sent [J.App. 548]; another dealer who was sixty (60) days in arrears on rent and no demand letter was sent [J.App. 549]; and, that accounts were not even viewed as "problem accounts" until they were sixty (60) days past due. The evidence further showed that Shell, which claimed to make its termination decisions regarding "failure to pay" terminations on an "ad hoc" basis, ordinarily did not terminate a franchise for "three NSFs or . . . two, or one or four" [J.App. 543-44], yet terminated Hinkleman's franchise for just this number. This "ad hoc" decisionmaking, it was argued, had to be viewed with suspicion here, particularly where there was direct evidence in the record that Shell representatives were dissatisfied with Hinkleman's operation for reasons unrelated to any financial matters [J.App. 324]; that Shell was displeased with Hinkleman from the very inception of its relationship with him [J.App. 650-51];[5] and, where there was evidence that Shell deviated from its normal policies in processing certain of Hinkleman's payments, from which an inference could be drawn that Shell was trying to "catch" Hinkleman in a payment problem.

B. THE MARYLAND ANTITRUST CLAIM - COUNT II.

When Hinkleman amended his complaint to seek damages for the PMPA violation, he also added Count II, charging that Shell violated the Maryland Antitrust Act by discriminating against him, and in favor of other Shell service station dealers, through Shell's application of its Variable Rent Program ("VRP"). Under the VRP, in which all Shell dealers participated, Shell unilaterally determined a gasoline volume

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[5] Hinkleman was already an Arco franchisee at the leased marketing premises when Shell acquired the location as a result of Arco's market withdrawal from Maryland in 1985. When Shell acquired the location, PMPA required that Shell offer Hinkleman a Shell franchise. 15 USC 2802(b)(2)(E)(iii)(II).

threshhold for each franchisee. For each gallon of gasoline that the dealer purchased from Shell above the threshhold level, the dealer received a 3.5 cent per gallon rebate, which was applied as a reduction against his or her station rental. Discovery showed that while other dealers were receiving average rent reductions under the VRP of 31.99% in 1987, 51.64% in 1988 and 49.04% in 1989, Hinkleman was receiving reductions of 0%, 0% and 10%, respectively. App. A at A3.[6]

Count II alleged that Hinkleman and other Shell dealers were purchasers of the same commodity bought for resale - gasoline. Through its discriminatory application of the VRP, Shell was said to have discriminated in favor of the other dealer purchasers by furnishing a service or facility (the service station facility) connected with the handling, sale or offering for sale of the gasoline on terms not accorded to all purchasers on proportionately equal terms. As a result, Hinkleman claimed that he sustained damage.

The district court granted Shell's F.R.Civ.P. Rule 12(b)(6) motion to dismiss the Maryland Antitrust Act claim for failing to state a claim upon which relief could be granted, ruling, in essence, that because a lease of real estate was involved, the claim was beyond the scope of Section 2(e) of the Robinson Patman Act ("RPA"), and was likewise beyond the scope of the Maryland Antitrust Act. App. B at B7-8. Thereafter, the Court granted Shell summary judgment on the PMPA claim, ruling, as a matter of law, that Hinkleman had failed to pay timely and that an inference of pretext could not be drawn from the evidence presented. App. C at C15. Hinkleman appealed to the Fourth Circuit.

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[6] By manipulating the threshhold volume figures, Shell effectively determined the amount, if any, that each dealer would receive under the program, and thereby determined the amount by which the dealer's operating costs would be affected. Hinkleman argued that this discriminatory treatment was also relevant to the PMPA claim, as further evidence that Shell had singled him out for termination.

C. THE FOURTH CIRCUIT'S DECISION.

The Fourth Circuit, in a per curiam opinion, affirmed the district court's grant of summary judgment on the PMPA claim, adopting Shell's position that a termination for failure to timely pay is *per se* reasonble, and that "further inquiry into pretext is unnecessary". App. A at A10. Over Judge Wilkins' dissent, the Court also affirmed the dismissal of the Maryland Antitrust Act claim. The Court analyzed the antitrust issue under the standards it deemed applicable to RPA Section 2(e) and found that a claim would not have been stated under Section 2(e) of the RPA because a real estate lease is involved; because the leased premises did not "promote the resale of gasoline", App. A at A16; because RPA Section 2(e) "only prohibits discrimination through services, like advertising or merchandizing, that promote the resale of the commodity", *Id.* at A16; and, because a "narrow view" of Section 2(e) would "promote more effectively the goals of the Robinson Patman Act." *Id.* at A17.

Judge Wilkins disagreed. Because the Maryland Act specifically defines "service" to include "any leasing," he found the Maryland Act broader than RPA Section 2(e). Moreover, and in any event, the majority, according to Judge Wilkins, misconstrued RPA Section 2(e), which is more expansive than the narrow interpretation given it by the majority. Finally, the dissent pointed out that, contrary to this Court's teachings, the majority justified its decision on the basis of its notion of "better economic policy." App. A at A22-23. According to Judge Wilkins, Hinkleman stated a claim, and the district court's decision should have been reversed.

Hinkleman thereafter petitioned for rehearing, with a suggestion for a rehearing *en banc*, which was denied. App. E.[7] This Petition urges that a writ of certiorari be granted to review the Fourth Circuit's action.

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[7] Three judges of the Fourth Circuit voted in favor of rehearing.

REASONS FOR GRANTING THE PETITION

I. THE PMPA CLAIM.

A. Introduction.

Review by this Court is essential to resolve a conflict among the Circuits on whether, and to what extent, inquiry into the reasonableness of terminations under the PMPA "events" sections, 15 U.S.C. 2802(b)(2)(C) and 2802(c), should be permitted. The decision below widens the split of authority on that issue, but goes beyond any other case that has prohibited such inquiry by precluding inquiry into pretext. In so holding, the Fourth Circuit has turned the PMPA on its head and has substantially eroded its protections. Review is necessary to restore the proper balance to the Act and to resolve the conflict on an issue that will surely reoccur.[8]

B. The PMPA.

In 1978, Congress enacted Title I of the PMPA to protect franchisees from "arbitrary or discriminatory termination or nonrenewal of their franchises." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 360 (4th Cir. 1986). *See also*, S. Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 874 ("Senate Report"). The Act was intended to remedy the disparity of bargaining power between franchisors and franchisees, and to preserve "the competitive influence of independent franchisees in the marketplace." *Roberts v. Amoco Oil Company*, 740 F.2d 602, 612 (8th Cir. 1984). As remedial legislation, it must be construed liberally, consistent with its primary goal of protecting franchisees. *Humboldt v. Exxon Co., U.S.A.*, 695 F.2d 386, 389 (9th Cir. 1982).

PMPA seeks to achieve its goals by "specifically set[ting] forth the permissible grounds for termination or nonrenewal of

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[8] As a review of the federal reports reveals, PMPA has generated considerable federal litigation since its enactment in 1978. This Court has yet to decide a PMPA issue.

franchise relationships, and bestow[ing] on federal courts jurisdiction to remedy violations of the Act." *Doebereiner v. Sohio Oil Co.*, 880 F.2d 329, 332 (llth Cir. 1989), *amended on den. of pet. for reh.*, 893 F.2d 1274 (llth Cir. 1990). Under the PMPA, the termination of a petroleum franchise is barred unless the termination meets specific statutory justifications. *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 984 (2d Cir. 1989). As described in *Bridges Enters. v. Exxon Co. U.S.A.*, 820 F.2d 123, 124 (5th Cir. 1987), "[t]he statute is exclusive: a franchisor may terminate or nonrenew a franchise only if its action is based on a permitted ground, and only if the stringent notification requirements of Section 2804 have been met." *See also, Barnes v. Gulf Oil Corp.*, 795 F.2d at 361. To further its beneficent purposes, PMPA shifts the burden of proof to the franchisor to show that the termination was in compliance with the Act. 15 U.S.C. 2805(c).

One of the grounds that PMPA recognizes as a basis for terminating a franchise is the "occurrence of an event which is relevant to the franchise relationship and as a result of which, termination of the franchise or nonrenewal of the franchise relationship is reasonable. . ." 15 U.S.C. 2802(b)(2)(C). Included as such an "event" is the "failure by the franchisee to pay in a timely manner when due all sums to which the franchisor is legally entitled." 15 U.S.C. 2802(c)(8). Any "failure" which is only "technical or unimportant to the franchise relationship", or "any failure for a cause beyond the reasonable control of the franchisee," 15 U.S.C. 2801(13), is, however, excluded.

C. The Present Case.

In the present case, Shell relied upon Hinkleman's alleged "failure to pay timely" as the assserted ground for the termination. Shell presented evidence that Hinkleman had tendered several checks to Shell that had been returned due to insufficient funds, and that there had formerly been an outstanding balance on Hinkleman's trade account. Hinkleman presented evidence

showing that any "failure" was only "technical or unimportant" because the checks were promptly replaced; because Shell had previously ignored the outstanding balance on the trade account, despite Hinkleman's efforts to secure its resolution; and, because Shell was ignoring substantial outstanding balances owed by others. Moreover, Hinkleman presented evidence to show that his payments were nevertheless "timely" *under the PMPA standard*, despite the technical delays, because of Shell's own established practices with respect to payment.[9] Additionally, however, Hinkleman presented substantial evidence that Shell's reliance upon the "failure to pay" ground was a pretext, and that Shell had arbitrarily and discriminatively singled Hinkleman out for disparate treatment. Hinkleman argued that the facts in the record were sufficient to raise an inference of pretext so as to preclude the summary determination of the issue. Shell's failure to act on more eggregious violations by others; Shell's termination of Hinkleman on the basis of several NSF checks that ordinarily would not be sufficient to warrant termination action;[10] Shell's expressed dissatisfation with Hinkleman for reasons unrelated to any payment problems; Shell's "ad hoc" approach to terminations; and, Shell's actions in holding two substantial checks longer than normal and depositing them on the same day, all suggested an improper motive according to Hinkleman.

The district court rejected Hinkleman's arguments, finding such evidence insufficient to withstand Shell's summary judgment motion. Drawing a positive inference from Shell's ad hoc approach to terminations, as opposed to the negative inference drawn in analogous contexts, *see, e.g., Fowler v. Blue Bell, Inc.*,

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[9] Hinkleman emphasized that PMPA's use of a "timely manner" standard was different from a contractual "payment when due" standard, given PMPA's purpose and the legislative history, as discussed in Note 2, *supra*.

[10] *See, e.g., Gibralter v. City of New York*, 612 F. Supp. 125, 129 (E.D.N.Y. 1985) (departures from normal procedures can supply evidence of discriminatory intent).

737 F.2d 1007, 1011 (11th Cir. 1984) (selection processes which are conducted in an ad hoc or discretionary manner must be viewed with particular suspicion), the district court granted Shell summary judgment. On appeal, the Fourth Circuit adopted Shell's argument that the PMPA ground upon which Shell relied was *per se* reasonable under the statute, and that further inquiry into pretext was thus unnecessary.

In adopting its "per se" approach to the reasonableness of the termination where a 2802(b)(2)(C) and 2802(c) "event" is involved, the Fourth Circuit followed the approach of the First, Second and Eleventh Circuits. Those Courts had previously found that a "termination [for an "event"] is conclusively presumed to be reasonable as a matter of law," *Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22, 26 (1st Cir. 1987); that "a court need make no further inquiry as to the *reasonableness* of the termination," *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir. 1986); and, that the list of "events" under 2802(c) "provides twelve situations in which Congress has decided that termination of a franchise agreement is reasonable," *Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1573 (11th Cir. 1987), without the need for further inquiry.

The above approach is directly contrary to that taken by the Third, Sixth and Seventh Circuits, which have recognized that a 2802(b)(2)(c) and 2802(c) event should not be construed as "a per se termination rule favoring franchisors," *Sun Refining and Marketing Co. v. Rago*, 741 F.2d 670, 673 (3d Cir. 1984);[11] that the Court "must scrutinize the reasonableness of terminations even when an event enumerated in Section 2802(c) has occurred," *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509, 1512 (6th Cir. 1989); and, that "events in the nature of contract

[11] In the only *en banc* decision in a PMPA case, the Third Circuit, while considering a nonrenewal under another section of the Act, recognized that Congress did not "preclude courts from scrutinizing the merits of termination or nonrenewal decisions that result from a franchisee's misconduct." *Slatky v. Amoco Oil Co.*, 830 F.2d 475, 481 (3d Cir. 1987) (en banc).

violations must be assessed by an independent analysis of reasonableness and materiality," *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1221 (7th Cir. 1982).

D. The Fourth Circuit's Extension of the Per Se Termination Rule.

What is particularly disturbing about this case, and the fact that makes it worthy of this Court's review, is that the Fourth Circuit extended the "per se" rationale to a new extreme by precluding inquiry into pretext. By so holding, not only did the Court part company with the Circuits rejecting the "per se" approach, but it also deviated from every other Court which has considered the issue of pretext in the PMPA setting.

In *Brach v. Amoco Oil Company, supra*, the Seventh Circuit recognized that even in the case of a nonrenewal based on a franchisor's business decision to nonrenew because of unprofitability under 15 U.S.C. 2802(b)(3)(D), "some analysis may be necessary to determine whether [the franchisor's decision] was nothing more than a pretext for nonrenewal". 677 F.2d at 1222.[12] In *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1392 (9th Cir. 1986), the Ninth Circuit, considering a nonrenewal under 15 U.S.C. 2802(b)(3)(A) ("failure to agree" to changes in the franchise), stated that courts will not "second guess" business decisions of the franchisor "[s]o long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal . . . ." In *Sandlin v. Texaco Refining and Marketing, Inc.*, 900 F.2d 1479 (10th Cir.), *cert. denied*, 111 S.Ct. 252 (1990), the Tenth Circuit quoted the above language from *Valentine* in recognizing that the franchisor may nonrenew for legitimate business reasons recog-

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[12] In the case of nonrenewals under 15 U.S.C. 2802(b)(3)(A) and 2802(b)(3)(D), the Courts have given particular deference to the "business judgments" of the franchisor. *See, e.g., Slatky v. Amoco Oil Co.*, 830 F.2d 476, 481 (3d Cir. 1987) (en banc). Nevertheless, even under this section, where franchisors have been given great latitude, the necessity of preventing pretext has been recognized.

nized by the Act as long as there is no "discriminatory motive" or "pretext". *Id.* at 1482.

The district courts have similarly recognized that terminations must not be pretextual. In *Gilderhus v. Amoco Oil Co.*, 470 F. Supp. 1302 (D. Minn. 1979), there was evidence presented that Amoco's termination was motivated by retaliatory considerations, and that it was simply looking for an excuse to terminate. In granting the dealer a preliminary injunction, the Court stated that such a termination would be invalid "since it would be contrary to the very purpose and policies of the [Act] to provide franchisees with meaningful protections from arbitrary and discriminatory terminations.'" 470 F. Supp. at 1305. In a later hearing in the same case, the Court noted that "[a]llowing Amoco to effect what might in fact be proved to be a retaliatory termination while maintaining technical compliance with the Act would violate the spirit and intent of the Act." *Gilderhus V. Amoco Oil Co.*, 1980-81 Trade Cas. (CCH), Para. 62,649 at 77,496 (D. Minn. 1980). *See also*, *Brownstein v. Arco Petroleum Products Co.*, 604 F. Supp. 312, 315 (E.D.Pa. 1985) (Court emphasizes PMPA's concern over "pretextual nonrenewals"); *Rogue Valley Stations, Inc. v. Birk Oil Co.*, 568 F. Supp. 337, 347-48 n. 6 (D.Or. 1983) (fanchisor who uses expiration of underlying lease as a pretext for what is actually a retaliatory or discriminatory termination might be found in violation of the PMPA); *Exxon Corp. v. Miro*, 555 F. Supp. 234, 237 (C.D. Cal. 1983) (same);[13] *Union Oil Co. of Calif. v. O'Riley*, 276 Cal. Rptr. 483, 492 (Cal. App.2d Dist. 1990) (the termination was found to be in retaliation for O'Riley's complaints about various conditions. The Court found that "[t]his type of retaliatory termination is exactly the sort of conduct which Congress enacted the PMPA to prevent"). In all of these cases, the need for a second level analysis into pretext was recognized.

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[13] Nonrenewals based on the expiration of an underlying lease fall, like the present case, under the "events" section. *See*, 15 U.S.C. 2802(c)(4).

E. Inquiry into Pretext is Necessary Whenever the Statute Seeks to Prohibit Arbitrary and Discriminatory Conduct.

The need for inquiry into pretext is readily apparent where "arbitrary and discriminatory conduct" is the evil sought to be remedied. In other statutes, the purpose of which is to prevent discriminatory conduct, inquiry into pretext is recognized as essential, despite the absence of language mandating such inquiry in the acts themselves. Common sense requires that such an inquiry be performed. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, a federal statute prohibiting discriminatory practices in employment, this Court, despite the absence of any mention of a pretext inquiry in the Act, has repeatedly held that such an inquiry is necessary. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) ("Title VII does not . . . permit petitioner to use respondent's conduct as a pretext for [prohibited discrimination]"); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("[P]laintiff must . . . have an opportunity to prove . . . that the legitimate reasons offered by the defendant were a pretext for discrimination."). Likewise, in discrimination suits under 42 U.S.C. §1981, inquiry into pretext is recognized as an essential question, although no mention is made of this inquiry in the legislation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989) ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms.").

The implicit reasoning behind all of these mandated inquiries into pretext is the same — such inquiry is necessary in order to effectively prevent the evil sought to be remedied. Here, allowing a franchisor to rely upon a statutory ground for termination, but precluding inquiry into pretext, will undermine PMPA's protections and the statutory objectives which Congress sought to achieve. Only by allowing such inquiry can a

statute aimed at preventing arbitrary and discriminatory conduct be given its intended effect.

II. THE MARYLAND ANTITRUST CLAIM.

A. Introduction.

Review by this Court of the Maryland Act claim is necessary to correct the Fourth Circuit's deviation from established principles of statutory construction and the resultant misinterpretation of both Section 2(e) of the Robinson Patman Act and Maryland's analog thereto. Because of the Fourth Circuit's perceived notion of "better economic policy," it has expressly limited the Maryland Act in a way that is so contrary to its plain language as to amount to a *de facto* preemption of the state legislation.

B. The Maryland Antitrust Act.

The Maryland analog to Section 2(e) of the Robinson Patman Act ("RPA") provides that a person may not:

> [d]iscriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

CL 11-204(a)(5).

With one important exception discussed *infra* at 22-24, this provision is substantially the same as RPA Section 2(e) [15 U.S.C. §13(e)].

In deciding the applicability of the Maryland Act, the Court of Appeals relied *solely* on its interpretation of the Robinson Patman Act. According to the Fourth Circuit, the discriminatory "services or facilities" proscribed under the RPA are limited to "advertising, promotional or merchandizing services." App. A

at A16. Based on this view of the RPA, the court held that the discrimination here is "not within the scope of the Robinson-Patman Act . . . and, therefore, also not within Section 11-204(a)(5) of the Maryland . . . statute." *Id.* at 380. The Court of Appeals' interpretation of the RPA is contrary to the Act's plain language, its legislative history and the cases of this Court interpreting it.

C. *The Fourth Circuit Failed to Follow This Court's Rules of Statutory Construction.*

The starting point of statutory construction is the literal language of a statute itself. In the absence of "a clearly expressed legislative intent to the contrary," unambiguous statutory language must be given its plain meaning. *Russello v. United States*, 464 U.S. 16, 20 (1983). While the Robinson-Patman Act as a whole is not a model of clarity, under the plain language of the section under discussion, Shell committed a violation if it furnished any service or facility connected with the sale of the commodity on terms that were not proportionately equal. Hinkleman alleged that Shell did not provide the service station facility on proportionately equal terms because of its discrimination under the VRP. Thus, the statute was clearly applicable unless qualifying words and phrases[14] were added to the plain language of the Act. The Fourth Circuit did that and reached the remarkable conclusion that in litigation under Section 2(e), "facility" does not mean something that "facilitates." Rather, it means something that "promotes." According to the Fourth Circuit's majority, because a branded service station does not "promote" gasoline sales but merely "facilitates" such sales, it is not a "facility" within the meaning of the statutes. App. A at A16. In so holding, the Fourth Circuit did not give the word "facility" its "ordinary, traditional meaning" as this Court has taught, *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). Rather,

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[14] The words "advertising," "promotional" and "merchandizing" do not appear in RPA Section 2(e).

the majority disregarded precedent and strained a convoluted interpretation of a statute that was otherwise plainly applicable.

D. The Legislative History Supports Hinkleman's Position.

While the legislative history of the RPA makes it clear that the Act was intended to apply to advertising and promotional services, it also makes clear that its scope was intended to be broader than just these areas. As this Court has noted on several occasions, the RPA was intended to fill in the "gaps" found in the Clayton Act. *F.T.C. v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 68-70 (1959); *F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 516-17 (1963); *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. 341, 349-52 (1968). Thus, if resort to legislative history is necessary, that history supports petitioner's position.

The RPA was intended to prevent "secret" discriminations which, prior to its passage, were beyond the reach of the Clayton Act. *F.T.C. v. Simplicity Pattern Co., Inc.*, 360 U.S. at 68. *See also, L&L Oil Co., Inc. v. Murphy Oil Corp.*, 674 F.2d 1113, 1118 (5th Cir. 1982). Because price discrimination may be disguised in many ways, this Court has recognized that the RPA was intended to be broad in its scope. *F.T.C. v. Fred Meyer, Inc.*, 390 U.S. at 349.[15] In *F.T.C. v. Sun Oil Co.*, this Court stated that:

> While, as noted, the immediate and generating cause of the Robinson-Patman amendments may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, *neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances.* Congress sought *generally* to obviate price discrimination practices

[15] *F.T.C. v. Fred Meyer, Inc.*, involved Section 2(d). That section and section 2(e) are treated as counterparts, and interpretations applicable to one are likewise applicable to the other. *L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1117 n. 5 (5th Cir. 1982).

> threatening independent merchants and businessmen, presumably *from whatever source*. The House Committee declared its "guiding ideal" in proposing the amendments to be "the preservation of equality of opportunity *as far as possible* to all who are usefully employed in the service of distribution and production * * *." H.R.Rep.No.2287, 74th Cong., 2d Sess. 6.

371 U.S. at 520 (emphasis added).

Giving a broad interpretation to the RPA is in accord with Congress' intentions. Quoting the legislative history of the RPA, the Seventh Circuit, in *Centex - Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971), *cert. den.*, 405 U.S. 921 (1972) stated:

> Section 2(e) should not be confined to the conventional type of promotional services such as window displays, demonstrator, exhibits and prizes, for Section 2(d), and therefore its companion Section 2(e), was "*made intentionally broader than this one sphere [payments for advertising and promotional services] in order to prevent evasion in resort to others [nonadvertising and nonpromotional services] by which the same purpose might be accomplished* * * *." 80 Cong.Rec. 9418. Section 2(e) was meant to cover "advertising, sales, and other services and facilities * * *." *Idem.* (emphasis added).

Judge Wilkins, who dissented from the majority's holding on the Maryland Act claim, revealed the flaw in the majority's restrictive reasoning. The dissent observed that this Court, in *Simplicity Pattern*, affirmed the Federal Trade Commission's finding that a manufacturer had violated §2(e) by furnishing steel storage cabinets free of charge only to larger stores. App. A at A22. As Judge Wilkins noted:

> Under the reasoning of the majority, if Simplicity had chosen to furnish on unequal terms the entire store, instead

of merely storage cabinets, it would have committed no violation of §2(e). Similarly, under the rationale for the majority, if Shell furnishes on unequal terms signs to be affixed to the front its gasoline purchasers' service stations, §2(e) is violated. But, if it furnishes the entire service station on unequal terms, §2(e) is not violated. The violation is more egregious, rather than non-existent, in the latter instances. *Id.*

In order to achieve its broad goals, Congress intentionally made the RPA's prohibitions reach beyond advertising and promotional services to other disguised forms of discrimination.[16] If this were not the case, then the RPA itself would be left with gaps that could be exploited by other "secret" discriminations. In the present case, Shell cleverly disguised its price discrimination by applying the discount to the rent payable for the service station facility, rather than directly discounting the price of the gasoline to the favored purchasers. Such a disguised discrimination is the exact type of conduct which Section 2(e) was designed to reach.

E. *The Court of Appeals Justified Its Narrow Approach to the RPA on an Economic Basis that Is in Conflict With the Holdings of this Court.*

There is a distinction drawn in the RPA between price discrimination and other secret forms of discrimination. Section 2(a) deals with price discrimination and is "hedged with qualifications." *Simplicity Pattern*, 360 U.S. at 64. Under §2(a), not only must the complainant make out a prima facie case by showing a competitive injury, but even if the complainant meets this burden, the Act provides an exception for

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[16] In fact, it is remarkable that such a limiting interpretation has been applied to RPA Sections 2(d) and 2(e), given the absence of any language in the statute to that effect. This is even more striking in light of the fact that when Congress intended to mention "advertising" in the Robinson-Patman Act, it did so in unmistakable terms. *See, e.g.*, RPA §3a (15 U.S.C. 13a).

price differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery . . ." *Id.* at 64-65. In contrast, §2(e) is absolute in its proscription. There is no requirement, as proof of a prima facie violation, of a showing of competitive injury. *Id.* at 65. Similarly, there are no built-in defenses like that in §2(a). *Id. See, Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974).

Because of these distinctions, the Fourth Circuit found it to be wiser economic policy to "limit the scope of Section 2(e)." App. A at A17. The court held that it "prefer[red]" to limit the scope of §2(e) to only advertising, merchandizing and promotional services because it believed that "other, nonpromotional forms of . . . discrimination should be judged under the more flexible standards of Section 2(a) so that courts can protect procompetitive behavior from prosecution." *Id.* This type of "judicial legislating" has been rejected by this Court.[17] In particular, in examining the RPA, this Court has stated that Courts are "not in a position to review the economic wisdom of Congress." *Simplicity Pattern Co.*, 360 U.S. at 67. Further, this Court rejected essentially the same economic argument advanced by the Court of Appeals when it refused to read a cost justification defense or competitive injury requirement into §2(e):

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[17] *See, Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 123, *reh'g denied sub nom, Shell Oil Co. v. Governor of Maryland; Continental Oil Co. v. Governor of Maryland*, 439 U.S. 884 (1978) ("the due process clause does not empower the judiciary 'to sit as a super legislature to weigh the wisdom of legislation'" quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)); *Corsa v. Tawes*, 149 F.Supp. 771 (D.Md.), *aff'd*, 355 U.S. 37 (1957) (it is not a judicial function to write amendments into law to accord with a court's ideas of wisdom and appropriateness); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 41 (1933) (it is not the function of the court to determine whether public policy finding expression in legislation is well or ill conceived) (citations omitted).

> [W]e cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis. In allowing a "cost justification" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.

Id. at 67-68.

Just as this Court recognized that deference must be given to Congress' determination of when competitive injury requirements and cost justification exceptions should apply, the courts must also give deference to Congress' choice of proscribed conduct that falls under §2(e) as opposed to §2(a). The Court of Appeals was wrong to legislate the narrowing of §2(e) in order to force litigation under §2(a) because of its view that this made for sounder economic policy.

F. The Court of Appeals Completely Ignored the Significant Difference Between the Maryland Act and the RPA.

The language of §2(e) of the RPA is substantially similar to that of the Maryland Act, with one important exception. The Maryland Act defines the term "service," so as to expand the scope of the Maryland Act.[18] Recognition must be given to this definition and to the intentional difference between the two

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[18] The Maryland Antitrust Act makes clear that it was enacted to "*complement* the body of federal (antitrust) law . . . ." CL 11-202(a)(1). While interpretation of the Maryland law is to be *guided* by federal court interpretation of similar statutes, the Court of Appeals of Maryland has made clear that courts are not to be "bound" by those interpretations. *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co.*, 282 Md. 7, 382 A.2d 867, 870 (1978). This is particularly true when the state statute, by its express terms, is more expansive than the previously enacted and interpreted federal statute.

statutes. Moreover, that difference must guide any statutory interpretation. Under the Maryland Act, "service" is defined as:

> *any* activity performed in whole or in part for the purpose of financial gain, and includes *any* sale, rental, *leasing*, or licensing for use.

CL 11-201(g) (emphasis added).

When this section of the Maryland Act is read in conjunction with CL 11-204(a)(5), together they read: "A person may not discriminate in favor of one purchaser against another purchaser of a commodity bought for resale . . . by . . . furnishing . . . *any leasing* . . . connected with the . . . sale . . . of the commodity on terms not accorded to all purchasers on proportionally equal terms."

Under the plain language of CL 11-204(a)(5) and 11-201(g), petitioner stated a claim upon which relief could be granted. The Fourth Circuit, however, virtually ignored the definition of "service" found in the Maryland Act, violating the fundamental principle of statutory construction that:

> Statutory definitions . . . furnish official and authoritative evidence of legislative intent and meaning, and are usually given controlling effect . . . . To ignore a definition section is to refuse to give legal effect to a part of the statutory law of the state.

1A Sutherland, Statutory Construction, Sec. 27.02 (Sands, 4th ed., 1985 Rev.). *See also, Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

While acknowledging the "significant difference" between the two Acts in a footnote, the Fourth Circuit dismissed the distinction by noting that, because the Maryland Act did not specify "real estate leasing," the court must still look to the RPA to determine if such leasing is within the Maryland Act. App. A at A14 n.8. As Judge Wilkins in his dissent correctly recog-

nized, the majority's casual dismissal of this "significant difference" was incorrect.

> The word "any" [in the Maryland Act] modifies each of the words following it, unambiguously stating *any* 'Leasing' is a service within the meaning of the Act. The Robinson-Patman Act contains no such definition .... This definition compels the conclusion that the lease of a service station is a 'service' under Section 11-204(a)(5).

Appendix A at A20.

This Court has said on several occasions that the federal antitrust laws do not preempt state law. *See, e.g., California v. Arc America Corp.*, 490 U.S. 93, 101 (1989) ("presumption against finding preemption of State law in [antitrust] area...."); *Watson v. Buck*, 313 U.S. 387, 403 (1941); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 559-60 (1937). Yet, by ignoring the distinction between the Maryland Act and Section 2(e) of the RPA and applying the RPA analysis without reference to such distinction, the Fourth Circuit has essentially preempted the Maryland Act in favor of its restrictive RPA interpretation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

ABRAMS, WEST & STORM, P.C.

HARRY C. STORM
Counsel of Record

APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FRANCIS GEORGE HINKLEMAN,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee

No. 91-2328

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Alexander Harvey, II, Senior District Judge
(CA-90-869-H)

Argued: October 28, 1991
Decided: May 6, 1992

Before RUSSELL and WILKINS, Circuit Judges,
and WARD, Senior United States District Judge
for the Middle District of North Carolina,
sitting by designation.

Affirmed by published per curiam opinion. Judge Wilkins wrote a concurring and dissenting opinion.

COUNSEL

ARGUED: Harry Carl Storm, ABRAMS, WEST & STORM, P.C., Bethesda, Maryland, for Appellant. M. Albert Figinski, WEINBERG & GREEN, Baltimore, Maryland, for Appellee. ON BRIEF: Carol Saffran-Brinks, WEINBERG & GREEN, Baltimore, Maryland, for Appellee.

OPINION

PER CURIAM:

Francis Hinkleman, a service station operator, appeals the district court's disposition under Federal Rules of Civil Procedure 12(b)(6) and 56 of his franchise claims against Shell Oil Company. Hinkleman had filed a two-count complaint with the district court alleging: 1) that Shell Oil Company's termination of his petroleum marketing franchise agreement violated section 102(b)(2)(C) of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2802(b)(2)(C) (1988); and 2) that Shell's discriminatory pricing practices through its lease of real estate to Hinkleman violated Maryland antitrust law, specifically Md. Com. Law Code Ann. § 11-204(a)(5) (1990).

The district court first dismissed Hinkleman's state antitrust claim under Rule 12(b)(6) for failure to state a claim, holding that the state statute prohibiting price discrimination did not apply to real estate leases. In a subsequent hearing, the district court granted Shell's motion for summary judgment on the franchise termination, ruling that Shell's termination of the franchise did not violate the PMPA. We affirm the district court's rulings.

I.

Beginning in 1978, Francis Hinkleman leased and operated a service station in Pasadena, Maryland, with his son. Shell acquired the service station premises in November 1985 from Arco and offered Hinkleman a three-year franchise agreement

to replace his existing agreement with Arco. The Shell franchise was renewed in November 1988 for five years.

Under all Shell franchise agreements, lessee dealers pay rent according to a Variable Rent Program (VRP). The VRP grants reductions in a dealer's monthly lease payment if the dealer's gasoline purchases for that month exceed a stated threshold volume. Shell calculates the threshold volume of gasoline to be purchased monthly by each dealer based on (1) the business value of the location to the dealer and to Shell; (2) the occupancy costs incurred by Shell; and (3) the fair market value of Shell's investment in the property. The exact method for determining a dealer's threshold volume is not made known to the dealers; Shell merely informs them of the determined volume. If a dealer's gasoline purchases exceed the threshold, he qualifies for a rent abatement in the amount of 3.5 cents per gallon purchased over the threshold level. The average rent reduction for all Shell dealers was 31.99% in 1987, 51.64% in 1988, and 49.04% in 1989. In comparison, Hinkleman's rent reductions for those years were 0%, 0%, and 10%, respectively.[1]

In late 1988 or early 1989, a dispute arose concerning certain items appearing on Hinkleman's monthly trade statement from Shell. As a result, an outstanding balance of approximately $1,500 was carried from January through October 1989.[2] The matter was ultimately resolved in November 1989 after other problems with Hinkleman's account had developed.

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[1] During those three years, Shell increased Hinkleman's threshold volume from 160,000 gallons per month to 170,000 gallons per month, despite his declining actual monthly sales during that period. Hinkleman attributes his decline in sales to the installation of a median strip in front of his station, thereby blocking access by certain traffic, and to the opening of a state-of-the-art Exxon station in the immediate area.

[2] Hinkleman did not dispute the whole $1,500 amount; however, he did not make any payment on this amount until the parties resolved the disputed charges.

In September 1989, Shell experienced the first in a series of problems collecting payments due under the franchise agreement. On September 20, a check for $9,448.14 tendered by Hinkleman to Shell as payment for a gasoline delivery was returned for insufficient funds. The bank admitted that the return of the check had been a bank error and issued a letter of apology to Hinkleman. Shell's territory manager nevertheless asked Hinkleman for a certified replacement check, refusing to accept a personal check offered by Hinkleman. When payment was not received, on September 27 Shell sent Hinkleman a written notice giving him until October 9 to replace the returned check or to be placed on certified funds status (i.e. requiring all payments be made by certified check).

On October 2, Hinkleman again tendered a noncertified replacement check, which Shell refused to accept. Hinkleman thereafter made no further attempts to pay before the October 9 deadline. On October 13, Shell sent a written demand for payment of $11,213.64 by October 20. This sum included the amount of the dishonored check from September as well as the disputed trade balance carried since January 1989. The letter threatened franchise termination if Hinkleman did not keep his account current in the future.

A few days later Shell attempted to collect its October rent payment in normal course through electronic bank draft, but that attempt was rejected by the bank. Hinkleman, his lawyer and Shell's representatives then met and agreed that Hinkleman would provide a certified check to pay the September balance due and the October rent. Both amounts were paid on October 20. The disputed trade balance was ultimately resolved and paid on November 6.

On November 30, 1989, Shell sent Hinkleman a letter clearly warning that a termination notice would be issued if any further incident of indebtedness occurred. Approximately one month later, on December 25, another check tendered to Shell

from Hinkleman did not clear the bank. Hinkleman notified Shell immediately upon learning of the check's dishonor and issued a replacement check on January 5, 1990.

In the ten-day interim before Shell received the replacement check, Shell sent Hinkleman a notice on January 4 stating its intent to terminate the lease and franchise agreement as of April 16, 1990. It cited Hinkleman's failure to make timely payments as the cause of termination. Shell had no set policy concerning the number of defaults it would tolerate before sending a notice of termination and determined each termination decision on the merits of the particular circumstances.

Two further incidents occurred after the date of the termination notice. On January 9, 1990, a check for $10,195.70 written for a gasoline delivery was returned for insufficient funds. Hinkleman subsequently replaced that check. The second incident took place on March 16, 1990, when Shell was unable to electronically draft the March rent because Hinkleman had closed his bank account. Hinkleman then tendered a check for the March rent within seven days.[3]

On March 23, 1990, Hinkleman filed suit in the U.S. District Court for the District of Maryland seeking injunctive relief from termination of the franchise. Shell consented to a temporary restraining order until a hearing could be held on the preliminary injunction. After a hearing on May 2, the court denied the injunction and Hinkleman vacated the leased premises.

Hinkleman, with leave of the court, then filed a two-count amended complaint seeking damages only. Count I alleged that Shell's termination was not in compliance with section 102(b)(2)(C) of the PMPA, 15 U.S.C. § 2802(b)(2)(C), which permits termination of a franchise agreement under specified circumstances. Hinkleman alleged that he had paid all outstand-

[3] The parties dispute whether or not Shell had prior notice of the closing of the bank account.

ing balances to Shell, with only insignificant delays, and that Shell's termination was arbitrary, discriminatory and pretextual. Count II added a claim under the Maryland Antitrust Act, specifically Md. Com. Law Code Ann. § 11-204(a)(5), alleging that Shell engaged in unlawful price discrimination against Hinkleman through its administration of the VRP. Hinkleman contended that Shell, by setting his threshold levels of gasoline purchases at unreasonably high levels, charged him a monthly rental amount in excess of that charged other Shell franchisees. He further contended that the leasing of the premises was a service provided by Shell directly connected with the sale of its gasoline to dealers. The Maryland Statute prohibits discrimination against a purchaser of a commodity bought for resale by furnishing any service connected with that commodity on unequitable terms to those purchasers.

Upon Shell's Rule 12(b)(6) motion, the district court dismissed Count II for failing to state a claim upon which relief could be granted. The court held that a real estate lease is not a "service" under the Maryland antitrust law, and, therefore, any allegations of discriminatory pricing practices through a real estate lease were not actionable under that statute. At a later date, the district court granted Shell's motion for summary judgment on Count I, finding that its termination of the franchise arrangement was in accordance with permissible terminations under the PMPA.

Hinkleman now appeals both judgments.

II.

We have jurisdiction in this case under 28 U.S.C. § 1291 (1988). We consider separately the district court's disposition of each claim, beginning with the grant of summary judgment on Count I.

A.

We review decisions granting summary judgment de novo, applying the same standards required of the district court. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir.1991); *see Higgins v. E.I. DuPont De Nemours & Co.*, 863 F.2d 1162, 1166-67 (4th Cir.1988). Summary judgment should be granted if the parties present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Miller v. Federal Deposit Ins. Corp.*, 906 F.2d 972, 973 (4th Cir.1990). In assessing the record evidence, we must view the facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The substantive law governing petroleum franchise agreements is the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2841. Congress enacted Title I of the PMPA to protect "franchisees from arbitrary or discriminatory termination or non-renewal of their franchises." S.Rep. No. 731, 95th Cong., 2d Sess. 15 (1978), reprinted in 1978 U.S.C.C.A.N. 873, 874. The PMPA prohibits termination or nonrenewal "unless ... based upon a ground specified or described in the legislation and ... executed in accordance with the notice requirements of the legislation." *Id*

Section 2802(b)(2) enumerates the grounds for termination or nonrenewal of a franchise relationship. One ground specified in section 2802(b)(2)(C), is:

> The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect....

Section 2802(c) follows with an illustrative list of events that qualify under section 2802(b)(2)(C) as "an event which is

relevant to the franchise relationship." One on that list is "failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled[.]" 15 U.S.C. 2802(c)(8). The statute provides additional guidance by defining "failure" so as not to include:

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

15 U.S.C. § 2801(13).

Applying the statute to the facts of this case, we find that Shell clearly acted within the PMPA in terminating its franchise agreement. Hinkleman failed on multiple occasions to make timely payments under the franchise agreement.[4] His September

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[4] Hinkleman contends that we should consider only the December 25 check returned for insufficient funds. The Senate Report on the PMPA states that "[i]f the franchisor waives the exercise of termination or non-renewal rights based upon a specific occurrence of an event, the franchisor may not thereafter base termination or non-renewal upon the specific occurrence." S.Rep.No. 731, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 873, 892. Hinkleman asserts that Shell waived its termination rights as to delinquent payments prior to the December 25 check when it decided not to terminate after each earlier occurrence. In addition, Hinkleman argues that Shell's January 4 termination notice cited only the December 25 delinquency.

We are not persuaded by this argument for the following reasons. First, Shell more likely preserved rather than waived its termination rights through its October 13 and November 30 letters. The letters expressed Shell's dissatisfaction with Hinkleman's late payments and, because of such, threatened automatic termination upon any similar occurrence. Second, section 2802(b)(2)(C) permits termination for an event occurring "not more than 120 days prior to the date on which notification of termination ... is given...." Hinkleman's late payments, beginning with the September 20 returned check, occurred within 120 days prior to the January 4 notice of termination. We, therefore, consider all occurrences prior to January 4 in determining whether Shell had statutory justification for terminating the franchise agreement.

payment was not made until October 20. While still delinquent in reissuing that check, Hinkleman's October rent payment did not clear the bank. After two written warnings, Hinkleman tendered yet a third bad check for payments under the franchise agreement on December 25. While the January 9 and March 16 incidents occurred after Shell had given notice of termination, they lend credence to Shell's justification for termination. The parties do not dispute that Shell gave proper notice of termination as required under the statute.

Furthermore, Hinkleman's failures are not exempt under section 2801(13) as "unimportant" failures. His failures constituted significant breaches of an important part of the franchise agreement. The number of delinquent payments as well as the length of delay in reissuing payment constituted more than just minor or technical violations of the franchise agreement. In addition, the amount of each delinquent sum was significant. Each of the payments were for several thousand dollars and were delinquent in the entire amount due. This is not a case of constructive payment, where all but an insignificant amount had been rendered to the franchisor. These payments represented Shell's entire income for a particular month from Hinkleman's operations or lease of real estate.

Hinkleman urges us not to end our analysis at this point. He would have us extend our inquiry beyond the statutory requirements into the reasonableness and good faith of the franchisor. The Court, he argues, should consider all circumstances related to the franchise relationship, such as Shell's more favorable treatment of other franchisees, in order to discover possible pretextual motives. It should then determine, based on the totality of the evidence, whether or not termination was reasonable. In so urging, Hinkleman looks beyond the plain words of the statute to its Congressionally stated purpose of protecting franchisees and so implies an additional reasonableness requirement. We find this an attempt to add complexity to

a relatively straightforward statute. We adopt Shell's position which relies on the plain language of the statute. It contends that the statute provides grounds that are per se reasonable for terminating a franchise, provided notification requirements are met, rendering further inquiry into pretext unnecessary.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring). The Supreme Court stated that "generalized references to the 'remedial purposes' of [an] ... Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S.Ct. 2479, 2490, 61 L.Ed.2d 82 (1979) (*quoting Securities Exchange Comm'n v. Sloan*, 436 U.S. 103, 116, 98 S.Ct. 1702, 1711, 56 L.Ed.2d 148 (1978)). "Thus, if the language of a provision ... is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary 'to examine the additional considerations of "policy" ... that may have influenced the lawmakers in their formulation of the statute.'" *Aaron v. Securities Exchange Comm'n*, 446 U.S. 680, 695, 100 S.Ct. 1945, 1955, 64 L.Ed.2d 611 (1980) (*quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 n. 33, 96 S.Ct. 1375, 1391 n. 33, 47 L.Ed.2d 668 (1976)).

The language of sections 2802(b) & (c) is clear on its face. It unambiguously permits termination of a petroleum franchise agreement upon failure of the franchisee to timely adhere to payment obligations. A specific, limited reasonableness requirement is incorporated into the statute through section 2801(13), which defines "failure" so as to exclude "any failure which is only technical or unimportant to the franchise relationship," or "any failure for a cause beyond the reasonable control of the franchisee." Once a franchisor proves that section 2801(13) does not apply, however, its actions are presumed

reasonable under the statute. The very language of the statute describes termination for late payments as reasonable. See 15 U.S.C. § 2802(c) ("'an event[,] ... a result of which termination of the franchise ... is reasonable,' includes .. failure by the franchisee to pay ... in a timely manner...."). Where, as here, the statute is sufficiently clear on its face, it is not necessary to turn to the legislative purpose to search for additional requirements.[5]

Other circuit decisions support our conclusion.[6] In a similar case from the Eleventh Circuit involving failure to cure monetary defaults under a franchise agreement, the court stated:

> By its very terms, the PMPA provides that "failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled" is "an event which is relevant to the franchise relationship and as a result of which termination of the franchise ... is reasonable...." Section

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[5] Although we need not look to the legislative purposes for clarification of this section, our interpretation fits squarely within the purposes intended by Congress. In enacting the PMPA, Congress intended to balance the "natural tensions which are created by this relationship [,]" i.e. balance "unfair terminations... by franchisors for arbitrary and even discriminatory reasons" with "reasonable expectations of compliance by the franchisee with the provisions of the franchise agreement[.]" S.Rep. No. 731, 95th Cong., 2d Sess. 17-18 (1978), reprinted in 1978 U.S.C.C.A.N. 875-76. In addition, Congress expressed a need for a "uniform set of rules governing the grounds for termination ... of motor fuel marketing franchises.... Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise...." Id. at 19, reprinted in 1978 U.S.C.C.A.N. at 877.

[6] We recognize that there is a division among the circuits on this issue. The Sixth and Third Circuits have taken a position contrary to other circuits. See Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509, 1512 (6th Cir.1989) ("we must scrutinize the reasonableness of terminations even when an event enumerated in s 2802(c) has occurred"); Sun Refining and Marketing Co. v. Rago, 741 F.2d 670, 673 (3d Cir.1984) ("we decline to construe § 2802(c) as a per se termination rule favoring franchisors").

> 102(c) of the PMPA, 15 U.S.C. § 2802(c), provides twelve situations in which Congress has decided that termination of a franchise agreement is reasonable.

Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565, 1573 (11th Cir.1987) (emphasis in original) (citations omitted); *see Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22, 26 (1st Cir.1987) ("If an event falls within the [section 2802(c)] list, termination is conclusively presumed to be reasonable as a matter of law."); *Russo v. Texaco*, 808 F.2d 221, 223, 225 (2d Cir.1986) ("Once having ascertained that an event is encompassed by one of the twelve enumerated events [in section 2802(c)], a court need make no further inquiry as to the reasonableness of the termination.").

Finding no genuine issue of material fact, and finding Shell's position the favorable under the law, we affirm the District Court's grant of summary judgment.

B.

In Count II of his complaint, Hinkleman asserts that Shell's VRP violated section 11-204(a)(5) of the antitrust subtitle of the Maryland Commercial Law. The district court dismissed Hinkleman's antitrust claim because it failed to state a cause of action under the statute. The court ruled that the statute's prohibition of price discrimination through services connected to the sale of a commodity did not apply to real estate leases. Rather, "services" included only marketing or advertising services for a particular commodity. Because this issue comes to us from a dismissal by the district court, we review only the narrow issue of whether a real estate lease can be a "service" connected to the sale of a commodity under the Maryland antitrust statute. We affirm the district court's ruling that it can not.

We review the district court's dismissal of a claim under Fed.R.Civ.Proc. 12(b)(6) de novo. "For purposes of review of

a Rule 12(b)(6) dismissal, the factual allegations of [a] complaint are taken as true." *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 979, 108 L.Ed.2d 100 (1990). The judgment to dismiss should be affirmed only if the plaintiff fails to prove any set of facts in support of a claim for which relief can be granted. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

Section 11-204(a)(5) of the Maryland commercial statutes provides that a person may not:

> [d]iscriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any service or facility connected with the processing, handling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

This provision is substantially identical to section 2(e) of the Robinson-Patman Act, codified at 15 U.S.C. § 13(e) (1988).[7]

The antitrust subtitle of the Maryland Commercial Law was enacted to "complement the body of federal [antitrust] law...." Md.Com.Law Code Ann. § 11-202(a)(1). The statute provides that federal court interpretations of similar federal laws should guide the interpretation of the Maryland antitrust laws. § 11-202(a)(2). Similarly, the federal district court has stated that state claims under section 11-204(a) and (b) must fail where those same claims would also fail under similar federal law.

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[7] Section 2(e) provides: It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Purity Prods., Inc. v. Tropicana Prods., Inc., 702 F.Supp. 564, 574 (D.Md.1988), *aff'd*, 887 F.2d 1081 (4th Cir.1989); *Neugebauer v. A.S. Abell Co.*, 474 F.Supp. 1053, 1071 (D.Md.1979). Since there are no state court decisions on this issue, and since the provisions of section 11-204(a)(5) are almost identical to those of section 2(e) of the Robinson-Patman Act,[8] we look to cases construing section 2(e) in considering Hinkleman's claim.

The Robinson-Patman Act gives no definition of prohibited "services or facilities" except that they be such as are "connected with the processing, handling, sale, or offering for sale" of a commodity purchased for resale. 15 U.S.C. § 13(e). In construing the statutory language, several federal courts have defined services within the purview of section 2(e) as "advertising," "promotional" or "merchandising" services. *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir.1979); *Kirby v. P.R. Mallory & Co., Inc.*, 489 F.2d 904, 910-11 (7th Cir.1973), *cert. denied*, 417 U.S. 911, 94 S.Ct. 2610, 41 L.Ed.2d 215 (1974); *Skinner v. United States Steel Corp.*, 233 F.2d 762, 766 (5th Cir.1956); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F.Supp. 819, 851 (M.D.Tenn.1974). Similarly, the Federal Trade Commission, in their guidelines to businesses seeking to act within the statute, stated that although "services" and "facilities" have not been defined by statute, one requirement is that they be used primarily to promote the resale of a commodity. 16 C.F.R. § 240.7.[9] For

[8] The only significant difference between the two statutes is that the Maryland statute provides a definition of "service." Section 11-201(g) of the subtitle defines "service" as any activity performed in whole or in part for the purpose of financial gain, and includes any sale, rental, leasing, or licensing for use. Although, as Hinkleman points out, this definition includes leasing, it does not specify real estate leasing. Therefore, we must still look to the governing provisions of § 11-204(a)(5) and its federal counterpart to determine if real estate leasing is a "service" under the statute.

[9] Section 240.7 gives a nonexclusive list of examples of services and facilities covered by sections 2(d) and (e): Cooperative advertising; Hand-

reasons fully stated below, we likewise adopt this interpretation and limit discriminatory "services or facilities" proscribed under section 2(e) of the Robinson-Patman Act to advertising, promotional or merchandising services.[10]

This construction supports the intent of the Robinson-Patman Act. In enacting the Act, Congress sought to maximize consumer welfare by preventing "distortion of competition among favored and disfavored buyers." Phillip E. Areeda, *Antitrust Law* 135 (1991). The purpose of section 2(e) in particular was to prevent this distortion from occurring through the disguise of advertising services, a scheme frequently employed to evade the prohibitions of the Clayton Act prior to enactment of Robinson-Patman. Note, *The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2(e) of the Robinson-Patman Act*, 83 Mich.L.Rev. 1584, 1593 & n. 55 (1985).

The specific question of whether section 2(e) applies to real estate leases is one of first impression for us. Only one court has ruled on this issue. In a summary fashion, the court in *Rea v. Ford Motor Co.*, 355 F.Supp. 842, 869 (W.D.Pa.1973), *rev'd in part on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974), held that "leasing and conveyances of real estate are not a violation of [section 2(e) of] Robinson-Patman as charged by plaintiffs." In *Rea*, the court was deciding if favorable terms of leasing and

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bills; Demonstrators and demonstrations; Catalogues; Cabinets; Displays; Prizes or merchandise for conducting promotional contests; Special packaging, or package sizes. The enumerated items are clearly advertising, promotional or merchandising in nature.

[10] Commentators have similarly posited that § 2(e) does not apply to services outside the scope of merchandising or advertising services. See, e.g., Fredrick M. Rowe, Price Discrimination Under the Robinson-Patman Act 371-72 (1962); Note, The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2(e) of the Robinson-Patman Act, 83 Mich.L.Rev. 1584, 1597-98 (1985).

real estate sales to certain car dealers by Ford was actionable under section 2(e) by a disfavored dealer. Despite favorable leasing terms given to certain dealers, the court found "no evidence of price discrimination [in the sale of automobiles] between dealers" and, thus, no violation of the Robinson-Patman Act. *Id.*

Furthermore, courts have not been willing to apply section 2(e) to every case in which a supplier of a product discriminates among customers. In an analogous prior case, this Court refused to apply section 2(e) to services not directly promoting goods bought for resale. *See David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52, 55 (4th Cir.1974) (holding that reduction in supply of cars available to purchaser retailer was "beyond the pale of Robinson-Patman"), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975); *see also Skinner v. United States Steel Corp.*, 233 F.2d 762, 765 (5th Cir.1956) (favorable credit terms to certain purchasers beyond scope of section 2(e)).

We are convinced that real estate leases like the one at issue here are not within the scope of Robinson-Patman Act section 2(e) and, therefore, also not within section 11-204(a)(5) of the Maryland antitrust statute. The leased premises here, like the quantity of cars supplied in *McGeorge Car Co.* or the credit terms in *Skinner*, do not actively promote the resale of gasoline by Hinkleman to the retail consumer. Rather, the premises merely facilitate Hinkleman's resale of gasoline. As we have already stated, Robinson-Patman section 2(e) only prohibits discrimination through services, like advertising or merchandising, that promote the resale of a commodity. While *McGeorge Car Co.* and *Skinner* can be factually distinguished from our case in that the services offered there primarily concern the original sale to the retailer, we would not adopt such a distinction as a means of demarcating services prohibited under section 2(e) from those outside its scope. Instead, as we have stated, we

would exclude real estate leases from the prohibitions of section 2(e) because they do not serve to promote a commodity to the ultimate retail consumer.

We adopt this narrow view of section 2(e) proscriptions in order to promote more effectively the goals of the Robinson-Patman Act. As previously stated, Congress sought through the Robinson-Patman Act to maximize consumer welfare by enacting statutes intended to prohibit anticompetitive behavior. Thus, section 2(a) of the Act, which prohibits both direct and indirect price discrimination, requires a showing of competitive injury to prove a violation of the Act.[11] A seller can successfully rebut a prima facie case of section 2(a) price discrimination by showing cost differentials in the goods sold or related services provided. This required showing of competitive injury absent cost justification demonstrates Congress' understanding that not all direct or indirect price differentials are anticompetitive. For example, quantity discounts justified by a lower manufacturing or handling cost would be protected under section 2(a). In contrast, section 2(e) requires no showing of competitive injury. Behavior found to violate section 2(e) "is illegal per se, irrespective of competitive impact and without resort to statutory justification." *Kirby*, 489 F.2d at 910. Because application of a per se rule risks adverse consequences, we prefer to limit the scope of section 2(e) to that necessary to fulfill the section's purposes. Other, nonpromotional forms of direct or indirect

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[11] Section 2(a), 15 U.S.C. § 13(a), provides: It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person ...: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered....

discrimination should be judged under the more flexible standards of section 2(a) so that courts can protect procompetitive behavior from prosecution.[12]

In holding that section 11-204(a)(5) does not apply to real estate leases, we affirm the district court's dismissal of Count II of Hinkleman's claim.

CONCLUSION

First, we find that Shell acted within the provisions of the PMPA when it terminated a dealer franchisee for repeatedly failing to make timely payments under the franchise agreement. Accordingly, we affirm the district court's grant of summary judgment on this issue. Second, we hold that section 11-204(a)(5) of the Maryland Commercial law, which prohibits furnishing services on a discriminatory basis to purchasers of goods for resale, does not apply to Shell's VRP, as a real estate lease is not a "service" promoting the resale of a commodity. We, therefore, affirm the district court's dismissal of this issue under Fed.R.Civ.P. 12(b)(6).

AFFIRMED.

WILKINS, Circuit Judge, concurring in part and dissenting in part:

I agree that the district court properly granted summary judgment in favor of Shell Oil Company on Hinkleman's cause of action under the Petroleum Marketing Practices Act, 15 U.S.C.A. §§ 2801-41 (West 1982). I disagree, however, that a service station cannot, as a matter of law, constitute a "service or facility" within the meaning of Md. Com. Law Code Ann. § 11-204(a)(5) (1990).

As explained in the majority opinion, Hinkleman alleges a violation of Maryland law, not § 2(e) of the Robinson-Patman

[12] Since Hinkleman did not bring charges of price discrimination under Md.Com.Law Code Ann. § 11-204(a)(3), which is similar to section 2(a), we do not examine his claim under that statute.

Antidiscrimination Act, 15 U.S.C.A. § 13(e) (West 1973); however, interpretation of § 2(e) given by federal courts guides interpretation of the Maryland statute. Md. Com. Law Code Ann. § 11-202(a)(2) (1990). In reaching its conclusion, the majority confines the type of benefits encompassed within the phrase "services or facilities" to only those benefits that "promote" the resale of the commodity and adopts an unduly restrictive interpretation of the term "promotes." Because its conclusion is unsupported by the plain language of the state or federal statutes in question, prior federal court decisions interpreting § 2(e), or the underlying purpose of that statute, I would reverse the Federal Rule of Civil Procedure 12(b)(6) dismissal of Hinkleman's cause of action under section 11-204(a)(5) and remand for further proceedings.

"Statutory construction begins with an examination of the literal language of a statute," and "in the absence of 'a clearly expressed legislative intent to the contrary,'" unambiguous statutory language must be given its plain meaning. *United States v. Blackwell*, 946 F.2d 1049, 1052 (4th Cir.1991) (*quoting Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983)). The plain language of sections 11-204(a)(5) and 2(e) prohibits the provider of a commodity intended for resale from discriminating among its customers by furnishing any "service or facility" connected with the offering for sale of the purchased commodity that is not furnished to its other customers on substantially equal terms. Thus, the sole issue before the court[1] is whether Shell's furnishing a service station to one of its customers from which gasoline is marketed

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[1] The terms of the variable rent program and how those terms translate into furnishing a service station on unequal terms to Hinkleman are detailed in the majority opinion. The posture of the case before this court requires that we assume that the service station was furnished by Shell on substantially unequal terms. Thus, we need only decide whether furnishing a service station through a lease amounts to furnishing a "service or facility."

for resale to the public amounts to furnishing a "service or facility."

The plain language of the Maryland Antitrust Act dictates that the lease of the service station is a service within the meaning of that Act. Section 11-201(g) of the Maryland Act defines the term "service" to include "any sale, rental, leasing, or licensing for use." Md. Com. Law Code Ann. § 11-201(g) (1990). The word "any" modifies each of the words following it, unambiguously stating that any "leasing" is a service within the meaning of the Act. The Robinson-Patman Act contains no such definition. Thus, while interpretations of § 2(e) should be used to guide those of section 11-204(a)(5), because the Maryland Act contains a provision not included in the Robinson-Patman Act that specifically defines this critical term, the plain language of that definition must control. This definition compels the conclusion that the lease of a service station is a "service" under section 11-204(a)(5).

Neither the state nor federal statutory schemes clarifies the meaning of the term "facility." A service station, however, qualifies as a "facility" in common parlance. A "facility" generally is defined as "something ... that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end" and "something that promotes the ease of any action, operation, transaction, or course of conduct." *Webster's Third New International Dictionary* 812-13 (1981). Consequently, I believe that a service station is a "facility" within the plain language of the statutes.

Federal courts consistently have interpreted the phrase "services or facilities" in § 2(e) to apply "to various benefits which facilitate the resale of a product by the favored customer." 3 Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law*, § 27.6, at 544 (1983) (noting that § 2(e) prohibits the furnishing of "benefit[s] which will make it easier for the favored customer to resell the product") [hereinafter Kintner]. Section 2(e)

prohibits a supplier from furnishing on substantially unequal terms benefits connected to the resale of a commodity purchased for resale, as opposed to benefits relating to the original sale. *See, e.g., Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir.1983), *cert. denied*, 465 U.S. 1038, 104 S.Ct. 1315, 79 L.Ed.2d 712 (1984); *see also* 16 C.F.R. s 240.7 (1991); Kintner s 27.6. Compare those benefits constituting a violation of s 2(e), *Federal Trade Comm'n v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005, 3 L.Ed.2d 1079 (1959) (catalogues, storage cabinets, and transportation costs); *P. Lorillard Co. v. FTC*, 267 F.2d 439 (3d Cir.) (advertising), *cert. denied*, 361 U.S. 923, 80 S.Ct. 293, 4 L.Ed.2d 240 (1959), and *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.) (salesrelated personnel), *cert. denied*, 326 U.S. 773, 66 S.Ct. 231, 90 L.Ed. 467 (1945), with those not violating § 2(e), *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 59 F.2d 1313 (9th Cir.1979) (refusal to sell certain line of products to customer), and *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir.1974) (quantity of product to be supplied to customer), *cert. denied*, 420 U.S. 992, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975). A review of the judicial decisions, scholarly writings, and regulatory clarification addressing the types of benefits encompassed in the phrase "services or facilities" in § 2(e) clearly demonstrates that those benefits which relate to and facilitate the resale of the product are included and those benefits which relate to or facilitate the original sale between the supplier and customer are excluded.

The majority concedes that a service station facilitates the resale of gasoline, rather than the original sale. The majority, however, holds that in order to be a "service or facility" within the meaning of § 2(e) a benefit must "promote" resale of the product and narrowly interprets what benefits in fact "promote" resale, ignoring that under prior interpretations of § 2(e) Hinkleman's allegations would be sufficient to state a cause of action. This restricted interpretation of § 2(e) contravenes not

only the plain meaning of the statute but also its purpose—to prohibit price discrimination in disguised forms. See discussion of legislative history at *P. Lorillard Co.*, 267 F.2d at 443 (advertising and promotional services were regarded as the principal form of price discrimination to which the Robinson-Patman Act was directed but the Act was intentionally drafted more broadly to encompass other practices that might accomplish price discrimination) and Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act*, § 13.2, at 370 (1962); *see also* discussion of historical background of the Robinson-Patman Act at *Simplicity Pattern Co.*, 360 U.S. at 68-69, 79 S.Ct. at 1013-14.

In *Simplicity Pattern Co.*, a manufacturer of dress patterns discriminated in favor of department and variety stores and against smaller stores by furnishing, among other things, steel storage cabinets free of charge to the larger stores. 360 U.S. at 59-60, 79 S.Ct. at 1008-09. The Supreme Court affirmed the finding of the Federal Trade Commission that *Simplicity* had violated § 2(e) by furnishing the larger stores "services and facilities not accorded to competing smaller customers on proportionally equal terms." *Id.* at 56-59, 79 S.Ct. at 1008-09. Under the reasoning of the majority, if Simplicity had chosen to furnish on unequal terms the entire store, instead of merely storage cabinets, it would have committed no violation of § 2(e).

Similarly, under the rationale of the majority, if Shell furnishes on unequal terms signs to be affixed to the front of its gasoline purchasers' service stations, § 2(e) is violated. But, if it furnishes the entire service station on unequal terms, § 2(e) is not violated.[2] The violation is more egregious, rather than non-existent, in the latter instances.

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[2] One is left to wonder how the majority would resolve the issue if the service station that was furnished on unequal terms had the Shell logo painted on the front of the building.

The majority justifies its restrictive interpretation of § 2(e) on the basis that economic policy is better served by limiting those benefits cognizable under § 2(e). The Supreme Court has emphasized, however, that courts are "not in a position to review the economic wisdom of Congress." *Simplicity Pattern Co.*, 360 U.S. at 67, 79 S.Ct. at 1012. Thus, a court should not implement its notions of proper economic policy by ignoring that Congress has plainly chosen under § 2(e) to make furnishing on a substantially unequal basis "services or facilities" connected with the sale of commodities purchased for resale a per se violation of law.

Further, the Supreme Court has previously rejected essentially the same economic argument as that advanced by the majority. Refusing to read a cost justification defense or competitive injury requirement into § 2(e), it stated:

> [W]e cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis. In allowing a "cost justification" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.

Id. at 67-68, 79 S.Ct. at 1012-13. As recognized by the Supreme Court, we must defer to Congress's decision concerning the merit of requiring competitive injury and should not legislate by attempting to restrict the scope of § 2(e) in order to force litigation of alleged violations to § 2(a) of the Act because the majority believes that this section advances sounder economic policy.

Moreover, the conclusion of the majority that a service station does not promote the resale of gasoline is dubious. Aside from the district court opinion in *Rea v. Ford Motor Co.*, 355

F.Supp. 842 (W.D.Pa.1973), *rev'd in part on other grounds*, 497 F.2d 577 (3d Cir.), and *cert. denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 106 (1974), which the majority concedes fails to provide any reasoning to justify its decision, the majority offers no authority for this conclusion. In my view, a service station does "promote" the resale of gasoline. To "promote" means "to contribute to the growth, enlargement, or prosperity of"; to further; to encourage; and "to present ... for public acceptance through advertising and publicity." *Webster's Third New International Dictionary* 1815 (1981). In the sense that a service station makes possible the resale of gasoline and presents gasoline to the public for resale, it promotes those sales. Thus, assuming the restrictive interpretation of "services or facilities" adopted by the majority is correct, it has been misapplied.

Assuming for purposes of Rule 12(b)(6) that Shell furnished service stations on unequal terms in connection with the sale of its gasoline through its variable rent program, that activity is prohibited by the plain language of the Maryland Antitrust Act. Additionally, a conclusion that Hinkleman's allegations state a cause of action is consonant with prior interpretations finding that § 2(e) prohibits the furnishing on an unequal basis benefits that facilitate the resale of the product and furthers legislative intent to prohibit disguised price discriminations. I would find that Hinkleman's allegations that Shell arbitrarily and discriminatorily established the thresholds above which its franchisees received a rent rebate on gasoline sales under its variable rent program, effectively supplying on unequal terms the service stations from which its franchisees resold gasoline purchased from Shell to the public, states a claim for relief under Md. Com. Law Code Ann. § 11-204(a)(5).

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DISMISSING COUNT II OF THE AMENDED COMPLAINT

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

FRANCIS GEORGE HINKLEMAN

Plaintiff

vs.

SHELL OIL COMPANY

Defendant

CIVIL NO. H-90-869

MEMORANDUM AND ORDER

Presently pending in this civil action is defendant's motion to dismiss Count II of the amended complaint. Plaintiff is Francis G. Hinkleman (hereinafter "Hinkleman"), a Maryland resident who formerly operated a retail service station at 103 Mountain Road in Pasadena, Maryland. Defendant is Shell Oil Company (hereinafter "Shell"), a Delaware corporation engaged in the refining and marketing of petroleum and related products.

The amended complaint in this lawsuit contains two counts. Count I alleges that the franchise agreement between the parties has been wrongfully terminated under federal law. Count II alleges that the administration of defendant's variable

rent program violated § 11-204(a)(5) of the Maryland Commercial Law Article.

Memoranda in support of and in opposition to the pending motion have been submitted and reviewed by this Court. A hearing on this motion is not necessary. *See* Local Rule 105.6. For the reasons to be stated herein, defendant's motion to dismiss Count II of the amended complaint will be granted.

I

Facts [1]

Francis Hinkleman and Shell executed a service station franchise agreement in 1985. On January 4, 1990, Shell sent Hinkleman a certified letter containing a notice of termination of the franchise, to be effective on April 16, 1990. As justification for the termination, Shell cited Hinkleman's failure to pay timely all sums due to Shell.

On March 23, 1990, Hinkleman filed a one-count complaint in this Court alleging wrongful termination of his dealership under the Petroleum Marketing Services Act, 15 U.S.C. § 2801 *et seq*. Shortly thereafter, Hinkleman sought a temporary restraining order and a preliminary injunction to prevent termination of his dealership. By agreement of the parties, a temporary restraining order was entered by the Court on April 16, 1990 to prevent immediate termination of the dealership. A hearing on plaintiff's motion for a preliminary injunction was then held on May 2. In a Memorandum Opinion filed on May 8, this Court denied plaintiff's motion for a preliminary injunction and ordered plaintiff to surrender the service station on or before May 21, 1990. Hinkleman surrendered the service station to Shell on May 21.

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[1] The factual background of the parties' dispute is more fully described in this Court's Memorandum Opinion of May 8, 1990. For purposes of the pending motion, less detail is necessary.

With leave of the Court, plaintiff filed an amended complaint on August 15, containing two counts. Count I seeks monetary damages for violation of the Petroleum marketing Practices Act.[2]

Count II alleges that the administration of defendant's variable rent program[3] violated § 11-204(a)(5), Md. Com. Law Code Ann.

II

Discussion

Section 11-204(a)(5) of the Maryland Commercial Law Article is a part of the state's antitrust subtitle, which was enacted "to complement the body of federal [antitrust] law. . . ." Md. Com. Law Code Ann. § 11-202(a)(1). The Legislature explicitly provided that construction of the antitrust subtitle should be "guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. . . ." Md. Com. Law Code Ann. § 11-201(a)(2).

Section 11-204(a)(5) provides that a person may not:

> [d]iscriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish, furnishing or contributing to the furnishing of any service or facility connected with the processing, han-

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[2] In its memorandum in support of the pending motion, Shell has advised that it will soon move for summary judgment on Count I. The deadline for submission of substantive motions in this case is November 30, 1990.

[3] As is customary in the petroleum business, Shell owns the realty on which its service stations are located. Under Shell's variable rent program, Shell dealers receive rent discounts for gasoline orders above specified levels. Thus, the more gasoline a dealer orders *from* Shell, the less rent he pays to Shell. Shell negotiates agreements involving rent discounts with each individual dealer, and provisions pertaining to rent discounts therefore differ from dealer to dealer.

> dling, sale, or offering for sale of the commodity on terms not accorded to all purchasers on proportionally equal terms.

This provision is substantially identical to § 2(e) of the Robinson-Patman Act, codified at 15 U.S.C. §13(e). That statute is as follows:

> Furnishing services or facilities for processing, handling, etc.
>
> (e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Count II of the amended complaint alleges that Shell's variable rent program (hereinafter the "VRP") violates § 11-204(a)(5). Plaintiff contends that Shell discriminated against him in favor of other Shell dealerships by not according him proportionally equal terms under the VRP. According to plaintiff, Shell was aware that the gasoline volume levels in its lease agreement with plaintiff were unreasonable and that plaintiff's inability to meet these levels would eventually lead to termination of his franchise.

In its motion to dismiss, Shell asserts that this Court should construe the Maryland statute in the same manner as federal courts have construed § 2(e) of the Robinson-Patman Act. Shell argues that the VRP could not violate § 2(e) because the VRP is not related to advertising or other promotional allowances and services. In support of this contention, Shell asserts that a real estate lease is not a tangible commodity for resale and that its

VRP is not connected with the advertising or promotion of gasoline.

Plaintiff responds that the plain language of the Maryland statute indicates that the prohibitions of § 11-204(a)(5) apply to Shell's VRP. Plaintiff contends that decisions under § 2(e) of the Robinson Patman Act should not control this Court's interpretation of Maryland's § 11-204(a)(5). In support of this assertion, plaintiff argues that the state antitrust subsection was intended to expand federal law, that federal case law does not bind courts construing state antitrust law, and that the Maryland statute defines "service" to include leases. *See* Md. Com. Law Code Ann. § 11-201(g).

A motion to dismiss under Rule 12(b)(6), F.R.Civ.P., should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conlev v. Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether to dismiss a complaint, this Court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. 2A *Moore's Federal Practice*, Para. 12.07 [2.-5] (2d ed. 1987); 5 C. Wright & A. Miller, *Federal Practice and Procedure* 1357, at 594-97 (1969).

On the record here, this Court concludes that defendant has met its burden of demonstrating that Count II of the amended complaint fails to state a claim under 11-204(a)(5), Md. Com. Law Code Ann. First, the Court is satisfied that Maryland's § 11-204(a)(5) is substantially identical to § 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). No cases have been cited construing § 11-204(a) (5) in a manner different from § 2(e), and the Court is not aware of any such authorities. Second, it is well established that federal case law guides any interpretation of Maryland's antitrust laws. *See Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co.*, 282 Md. 7, 12 (1970); *Neugebauer v. A.S. Abell Co.*, 474 F. Supp. 1053, 1071 (D.Md.

1979) (Young, J.); *Purity Products, Inc. v. Tropicana Products, Inc.*, 702 F. Supp. 564, 574 (D.Md. 1988) (Harvey, J.), *aff'd*, 887 F.2d 1081 (4th Cir. 1989). Under these circumstances, this Court will interpret Maryland's § 11-204(a)(5) as imposing the same legal duty as does § 2(e) of the Robinson-Patman Act.

"The purpose of § 2(e) . . . is to strengthen the prohibition against unfair price discrimination disguised in the form of advertising or promotional services provided to purchasers on a discriminatory basis." *Purdy Mobile Homes, Inc. v. Champion Home Bldrs. Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979). *See also Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 678 (9th Cir. 1975); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974). It is thus apparent that § 2(e) of the Robinson-Patman Act is concerned exclusively with discrimination in the advertising, promotion or merchandising of a commodity for resale. Accordingly, it has been held that § 2(e) applies only to services or facilities connected with the *resale* of the product by the purchaser. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

Apart from these broad criteria, courts have not formulated a test to determine when § 2(e) applies. Instead, the issue has been left for resolution on a case-by-case basis.[4] Examples of services held covered under § 2(e) include: advertisements,

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[4] Further guidance is provided by regulations published by the Federal Trade Commission. These regulations list the following examples of services within the scope of § 2(e): handbills, displays, demonstrations, catalogs, storage cabinets, accepting returns for credit, prizes or merchandise for conducting promotional contests. 16 C.F.R. § 240.5 (1990). One commentator has theorized that "to fall within the category of a 'service or facility,' the benefit: (1) must be of a kind which facilitates resale by the purchaser (rather than the original sale to the purchaser); (2) must be accorded to the buyer 'in connection with' (or bearing some relationship to) the 'sale' of a commodity; and (3) must be with respect to a product the purchaser is reselling rather than consuming. E. Kintner, *Federal Antitrust Law* § 27.6 (1983).

demonstrators, partial payment of customer's salaries, right to return merchandise, and mailings to clients of favored customers. E. Kintner, *Federal Antitrust Law* § 27.6 (1983) (citations omitted).

Courts have been unwilling to apply § 2(e) to every case in which a supplier of a product discriminates among customers. Section 2(e) has been ruled inapplicable in cases involving the following services: allocation of merchandise (including willingness to sell at all), availability and terms of credit, and deliveries. E. Kinter, *Federal Antitrust Law, supra* at § 27.6. Significantly, two courts have held that § 2(e) does not apply to real estate leases or real estate transactions. *Rea v. Ford Motor Co.*, 355 F. Supp. 842, 869 (W.D. Pa. 1973), *rev'd in part on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Export Liquor Sales, Inc. v Ammex Warehouse Co.*, 426 F.2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

When these principles of federal case law are applied to the allegations of the amended complaint, it is apparent that no violation of § 2(e) of the Robinson-Patman Act has been alleged. The allegedly discriminatory rents charged by Shell do not help favored dealers merchandise gasoline. *See Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534. The leases and the gasoline are therefore not related closely enough for § 2(e) to apply. Although it could be argued that Shell's alleged discrimination in its VRP hindered plaintiff's attempts to merchandise gasoline (for example, by raising his "overhead" costs), the argument proves too much, inasmuch as the statute focuses on the *form* of the alleged discrimination and not its *effect*.

The fact that the allegedly discriminatory service is directly related to real estate is also an important factor here. The leasing of real estate involves a type of transaction which is quite different from the sort of services which courts have ruled are covered by § 2(e). As noted hereinabove, two courts have

explicitly held that real estate transactions are outside the scope of the statute. Finally, as defendant points out, every parcel of real estate is essentially unique and terms of a real estate lease would not lend themselves to being discriminatory.

For these reasons, this Court concludes that since Count II of the amended complaint does not allege a violation of the Robinson-Patman Act, it likewise does not state a claim under § 11-204(a)(5) of the Maryland Commercial Law. Count II does not allege discrimination in the advertising, promotion or merchandising of gasoline. The leases involved here can be characterized as "connected" with retail sales of gasoline only in the most attenuated sense. Moreover, § 11-204(a)(5) does not apply to real estate leases. Accordingly, Count II must be dismissed.

III

Conclusion

For the reasons stated, it is this *5th* day of October, 1990, by the United States District Court for the District of Maryland,

ORDERED that defendant's motion to dismiss Count II of the amended complaint be and the same is hereby granted.

Chief, United States District Judge

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GRANTING SUMMARY JUDGMENT ON COUNT I OF AMENDED COMPLAINT

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

FRANCIS GEORGE HINKLEMAN

Plaintiff

vs.

SHELL OIL COMPANY

Defendant

CIVIL NO. H-90-869

MEMORANDUM OPINION

In this civil action, the operator of a gasoline service station is seeking damages and other relief from his supplier of petroleum products under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* (hereinafter "the PMPA"). Plaintiff Francis G. Hinkleman operated a retail service station in Pasadena, Maryland until May of 1990, when his franchise was terminated. He had previously instituted this suit against defendant Shell Oil Company (hereinafter "Shell") seeking injunctive relief and damages.

Prior proceedings in the case have been extensive. When suit was filed on March 23, 1990, plaintiff was still operating his service station but had previously received a notice from

defendant Shell of its intention to terminate, effective April 16, 1990, the franchise agreement between the parties. With his complaint, plaintiff had filed a motion for a temporary restraining order and a motion for a preliminary injunction seeking to enjoin defendant from termination of the franchise. Following a hearing on April 16, 1990, the Court entered, with the consent of defendant Shell, a temporary restraining order restraining and enjoining Shell from terminating the franchise relationship between it and plaintiff until the Court had held a hearing on plaintiff's motion for a preliminary injunction.

Following briefing by the parties, an evidentiary hearing was held on May 2, 1990 on plaintiff's motion for a preliminary injunction. Both plaintiff and his son testified at that hearing, as did Shell's Territory Manager.[1] In an 18-page Memorandum Opinion filed on May 8, 1990, the Court denied plaintiff's motion for a preliminary injunction. An Order was entered that same day directing plaintiff to surrender his service station to defendant on or before May 21, 1990.

Plaintiff duly vacated his service station, and proceedings have continued in the case with respect to plaintiff's claim for damages. A Scheduling Order was entered by the Court on May 25, 1990 setting dates for the completion of discovery. Meanwhile, plaintiff was permitted to amend his complaint to add an additional count. Count I of the amended complaint repeated earlier allegations that the franchise agreement between the parties had been wrongfully terminated by defendant under the PMPA. Count II added the claim that the administration of defendant's variable rent program had violated provisions of the Maryland Commercial Law Article.

Defendant then filed a motion to dismiss Count II of the amended complaint. Following its review of the parties'

[1] An Order was entered on May 2, 1990, extending the temporary restraining order until the Court had ruled on the motion for summary judgment.

memoranda, the Court in a Memorandum and Order dated October 5, 1990, granted defendant's motion to dismiss Count II of the amended complaint.

Following the completion of discovery, defendant Shell filed a motion for summary judgment. In addition to memoranda of law, the parties have filed depositions, affidavits and exhibits in support of and in opposition to the pending motion for summary judgment. A transcript of the evidentiary hearing held in open Court on May 2, 1990 has likewise been made available to the Court. Argument of counsel was heard in open Court on December 14, 1990. For the reasons to be stated herein, this Court has concluded that defendant's motion for summary judgment should be granted.

I

Facts

The facts pertaining to the parties' dispute in this case were set forth in some detail in the Court's Memorandum Opinion of May 8, 1990, and in its Memorandum and Order of October 5, 1990. The discovery undertaken by the parties since the entry of the Court's Scheduling Order of May 25, 1990 has not materially altered the facts described in the Court's Memorandum Opinion of May 8, 1990. The findings of fact made by the Court in denying plaintiff's motion for a preliminary injunction are accordingly affirmed and are hereby adopted in support of the rulings made by the Court herein.

In contending that there are genuine issues of material fact requiring a trial in this case, plaintiff has asked the Court to consider supplementary evidence produced during discovery. Plaintiff argues that he is entitled to recover damages for the alleged wrongful termination of the franchise and relies on deposition testimony of representatives of defendant relating to the practices and policies followed by Shell for the termination of a franchisee who has failed to pay Shell sums due under the

franchise agreement. In addition, plaintiff relies on documents pertaining to the operation of defendant's variable rent program.

John P. Johnson, Jr. is Shell's Territory Manager for the area in which plaintiff's service station is located. Kenneth Gill is an Area Manager with extensive prior experience as a Territory Manager in the operation of Shell's franchises. Both Gill and Johnson testified that Shell does not have a set policy concerning the number of defaults it will tolerate before sending a letter of demand or a notice of termination. Decisions are made on an *ad hoc* basis, and Shell normally does not terminate a franchisee for merely the passing of several bad checks.

As noted in the Court's Memorandum and Order of October 5, 1990, Shell, as is customary in the petroleum business, owns the realty on which its service stations are located. Under Shell's variable rent program, Shell dealers receive rent discounts for gasoline orders above specified levels. Accordingly, the more gasoline a dealer orders from Shell, the less rent he is required to pay to Shell. Provisions pertaining to rent discounts are negotiated with each individual dealer, and such provisions therefore differ from dealer to dealer. As noted in the Court's Memorandum Opinion of May 8, 1990, plaintiff since 1985 has had an ever-eroding sales volume. Plaintiff has not therefore been able to benefit from Shell's variable rent program to the same extent as other franchisees. According to plaintiff, defendant discriminatorily set his optimal volume levels at artificially high levels in order to drive him out of business.

II

Summary Judgment Principles

One of the purposes of Rule 56 is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and supported, to come forward with some minimal facts to show that a defendant may be liable under the claims alleged. *See* Rule 56(e). Moreover, "'[a] mere scintilla of

evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seaqo v. North Carolina Theaters, Inc.*, 42 F.R.D. 627, 640 (E.D.N.C. 1966), *aff d*, 388 F.2d 987 (4th Cir. 1967)). In the absence of such a minimal showing, a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial. As Judge Winter said in *Bland v. Norfolk and SouthernRailroad Company*, 406 F.2d 863, 866 (4th Cir. 1969):

> While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of a motion for summary judgment is to smoke out if there is any case, *i.e.*, any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.

In two cases decided in 1986, the Supreme Court clarified and expanded the principles applicable to a trial court's consideration of a summary judgment motion filed under Rule 56. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In *Anderson*, the Supreme Court held that the standard for granting a summary judgment motion under Rule 56 is the same as that for granting a directed verdict under Rule 50, F.R.Civ.P., 477 U.S. at 250-51. The Court explained this standard as follows:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *The mere existence of a scintilla of evidence in support of the plaintiff s position will be insufficient;* there must be

> evidence on which the jury could reasonably find for the plaintiff.

Id. at 252 (emphasis added).

In *Catrett*, the Court observed:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."
>
> Fed. Rule. Civ.P. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327.

The Fourth Circuit, in discussing the holdings of *Anderson* and *Catrett*, has emphasized that trial judges have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphrey Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (quoting *Celotex, supra*, 477 U.S. at 323-24).

Since in this particular case plaintiff has satisfied his burden of demonstrating that Shell has sought to terminate the franchise, defendant Shell has the burden of proving that the termination was valid under the PMPA. 15 U.S.C. § 2805(c). To prevail then, defendant Shell must establish as a matter of law by affidavits, deposition testimony or as otherwise per-

mitted by Rule 56 that it has met the burden imposed upon it by the PMPA.

On the record here, this Court has concluded that this burden has been met and that defendant's motion for summary judgment must be granted. Since the facts of record here "taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment in favor of defendant is appropriate. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Defendant Shell has here demonstrated as a matter of law that its termination of plaintiff's franchise was valid under the PMPA. Plaintiff cannot point to evidence in the record which would permit a fair-minded jury to find that defendant's termination of plaintiff's franchise was unreasonable.

III

Discussion

In earlier denying plaintiff's motion for a preliminary injunction, this Court concluded on the record before it that defendant Shell had met its burden of showing that its termination of the franchise was valid under the PMPA and that there did not exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation. In spite of the discovery undertaken by the parties since the Court's earlier ruling, the material facts remain unchanged. The issue now before the Court under Rule 56 is a similar one, namely whether there is evidence in the record on which a jury might rely to find in favor of plaintiff. Although a short answer to the question posed is provided by the Court's previous findings and conclusions, the Court will nevertheless undertake to examine the record anew in the light of the memoranda and arguments which have addressed the issues raised by the pending motion for summary judgment.

As noted by the Second Circuit in *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 983 (2d Cir. 1989), the overriding purpose of the PMPA is to protect franchisees from arbitrary and discriminatory terminations of their franchises. *See also Bellmore v. Mobil Oil* Corp., 783 F.2d 300, 304 (2d Cir. 1986) and *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 478 (3d Cir. 1987) (en banc). Nevertheless, in enacting the PMPA, Congress recognized "the legitimate needs of a franchisor to be able to terminate a franchise . . . based upon certain actions of the franchisee, including certain failures to comply with contractual obligations. . ." S. Rep. No. 731, 95th Cong., 2d Sess. 19 U.S. Code Cong. & Admin. News (1978), p. 877; *Sun Refining & Marketing Co. v. Rago*, 741 F.2d 670, 673 (3d Cir. 1984). The PMPA was not intended by Congress to be used by a franchisee as a shield to forbid proper termination of a franchise agreement, and indeed the statute itself sets forth wide ranging grounds for termination. *California Petroleum Distributors, Inc. v. Chevron U.S.A.*, 589 F. Supp. 282, 285, 288 (E.D.N.Y. 1984).

Title 15 U.S.C. § 2802(b)(2)(C) includes as a ground for the termination of a franchise the occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise is reasonable, provided that such event occurs during the period of the franchise and the franchisor first acquired knowledge of the occurrence not more than 120 days prior to the date of notification of termination. The statute goes on to define the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable" as including a "failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled; . . . ." § 2808(c)(8).

In this case, there is little doubt that plaintiff failed to pay Shell in a timely manner when due sums to which Shell was legally entitled. Plaintiff had delivered to Shell on December

25, 1989 a check for delivery of motor fuel which when presented for payment on January 2, 1990, was returned by the bank for insufficient funds. When Shell demanded immediate payment of the amount due by certified check, plaintiff's son indicated that he could not make the payment due immediately but that funds might become available on January 5, 1990. Shell sent its notice of termination to plaintiff on January 4, 1990.

Relying on *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1573 (11th Cir. 1987), defendant contends that plaintiff's failure in December, 1989 and January, 1990 was a *per se* ground for termination of the franchise. Although this *per se* test has also been adopted by the Second Circuit and elsewhere, *see Darling, supra* at 984; *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir. 1986); and *Cantrell v. Exxon Co. U.S.A.*, 574 F. Supp. 313, 316 (M.D. Tenn. 1983), some courts have held that terminations for late payment must be independently examined for reasonableness. *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509 (6th Cir. 1989); *Sun Refining & Marketing Co. v. Rago, supra*. Whatever standard is applied here, this Court finds and concludes as a matter of law that defendant Shell acted reasonably under the PMPA in terminating plaintiff's franchise. Plaintiff's delivery to Shell on December 25, 1989 of a check which was returned for insufficient funds and plaintiff's refusal to make good that payment by giving Shell a certified check on or before January 4, 1990 constituted a "failure" to make payment in a timely manner. Because of the lengthy history of plaintiff's delinquencies, this failure was not a technical one, nor was it unimportant to the franchise relationship. *See* § 2801(13)(A). Moreover, this failure was not for a cause beyond the reasonable control of plaintiff. § 2801(13)(B). As discussed more fully in the Court's Memorandum Opinion of May 8, 1990, plaintiff's irresponsible bookkeeping practices were the immediate cause of the return of this particular check for insufficient funds. (Slip op. at 17). The more basic cause was plaintiff's financial distress. (Slip op. at 15-16).

Accordingly, if the *per se* test is applied, the event relied upon by defendant is reasonable pursuant to the statutory definition contained in § 2802(c)(8). But, even if plaintiff's termination for late payment is independently examined for reasonableness, this Court finds and concludes as a 'matter of law that defendant Shell was in full compliance with the requirements of the PMPA. The events of December, 1989 and January, 1990 were not isolated ones. During the period before his termination and even after, plaintiff was continuously unable to keep his financial house in order. Indeed, overdrafts or electronic withdrawal failures occurred on five separate occasions between mid-September of 1989 and the filing of this civil action in March of 1990. Plaintiff's delinquencies were clearly relevant to the franchise relationship, and it was reasonable for Shell to be justifiably concerned as to plaintiff's financial stability. Financial distress of the franchisee is obviously a factor of some importance to the franchisor. In *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1217 (7th Cir.), *cert. denied* 469 U.S. 982 (1984), the Court held that termination was proper where the franchisee was "in financial distress" and had failed to cure dishonored checks.

In arguing that the claimed failure in this case was merely technical and unimportant to the franchise relationship, plaintiff Hinkleman focusses solely on the failure to pay which oecurred in December of 1989 and early January of 1990. Plaintiff asserts that the failure in question lasted only a few days and that payment of the amount due was made on January 5, 1990, which was one day after the notice of termination was received. According to plaintiff, such a failure must be considered merely technical and not of importance to the franchise relationship.

In advancing this argument, plaintiff Hinkleman ignores the history of his deficiencies in paying Shell amounts due under the franchise agreement and the lease between the parties. An objective standard must govern consideration of the reasonable-

ness of the termination of a franchise agreement under the PMPA. *Darling v. Mobil Oil Corp., supra* at 989. All relevant facts and circumstances must be taken into consideration in determining whether the franchisor's act of termination was reasonable, including events occurring between the commencement of the franchise agreement and its purported termination. *Id.* at 991.[2]

When all such facts and circumstances are considered in this case, it is apparent that defendant Shell acted reasonably in terminating plaintiff's franchise for the reason assigned. The record in this case discloses a lengthy history of problems encountered by the parties because of plaintiff's failure to make timely payments of sums due for product under the franchise agreement and for rent. Beginning in July of 1986 and continuing until the termination of the franchise in May of 1990, Shell has on numerous occasions experienced difficulty in obtaining timely payments from plaintiff for deliveries of petroleum products and for rent due. Plaintiff's delinquencies have included both the issuance of bad checks and dishonored rent drafts. Even disregarding overdrafts which occurred prior to the new franchise agreement of November 1, 1988, the record discloses that plaintiff has since September of 1989 been repeatedly unable to keep his financial house in order. Overdrafts have occurred on five separate occasions after November 1, 1988, namely on September 20, 1989 for the sum of $9,448.14;[3] on October 20, 1989, for the sum of $4,757.08 (electronic withdrawal); on December 25, 1989, for the sum of $9,590.46; on January 9, 1990, for the sum of $10,195.76; and

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[2] Citing *Marathon Petroleum Corp. v. Pendleton, supra*, plaintiff in his opposition to the pending motion concedes that this Court must consider all of the facts and circumstances surrounding the termination in order to determine if there has been a failure under § 2801(13). (Plaintiff's Opposition at p. 16).

[3] Plaintiff argues that the September delinquency was the result of a "bank error." However, the evidence discloses that plaintiff's account was

on March 16, 1990, for the sum of $5,675.26 (electronic withdrawal).

Plaintiff argues that defendant has waived its right to rely on events occurring before delivery of the December 25, 1989 check because Shell chose not to terminate the franchise for defaults occurring in September and October of 1989. This argument has a hollow ring. In one breath, plaintiff asserts that Shell acted unreasonably in relying on a single failure based on the bad check of December 25, 1989. In the next breath, plaintiff contends that Shell surrendered its right to rely on any prior delinquencies occurring within 120 days of the notice of termination because it permitted plaintiff to remain as a franchisee in spite of the defaults. Certainly, Shell cannot be penalized for giving plaintiff another chance to act responsibly in paying sums due. As the Court said in *California Petroleum Distributors, Inc., supra* at page 288: "That [the franchisor] spent four months actively trying to preserve the franchise agreement should not be used against it now."

On October 13, 1989, Shell sent a letter to Hinkleman warning him that if his account was not kept current, the franchise would be terminated. Thereafter, plaintiff and his attorney met with a representative of Shell in an attempt to resolve plaintiff's financial problems. Shell's letter of November 30, 1989 indicated that past indebtedness problems and billing disputes had been resolved and suggested that the parties were now operating "with a clean slate." However, Shell's decision to forego any right of termination was subject to the express condition that a termination notice would be issued in the event that Shell experienced "any further incident of indebtedness with you." The letter of November 30, 1989 stated:

> Our decision to rely on your creditworthiness stems from your assurance that you can maintain your ac-

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indeed overdrawn at the time and that the so-called "error" resulted because the bank did not cover the overdrawn check.

> count current. Given the past indebtedness problems, we expect strict compliance by you in the prompt payment of debts.

The fact that Shell thereby gave plaintiff one more chance to act responsibly is evidence of its intention to be reasonable in its dealings with plaintiff. When plaintiff's check of December 25, 1989 was returned for insufficient funds and when plaintiff failed to make immediate payment on January 3, 1990, Shell had every right under the PMPA not only to terminate the franchise but also to rely on prior delinquencies of plaintiff occurring within the 120 day period as evidence of the reasonableness of its actions. *See Wisser Co., Inc. v. Mobil Oil Corp.*, 730 F.2d 54, 60 (2d Cir. 1984).

Plaintiff also argues that this Court should not be entitled to consider delinquencies occurring on January 9, 1990 and March 16, 1990 after the notice of termination had been received. This Court would disagree. Applying an objective standard here, these later defaults are highly relevant as proof of a pattern on plaintiff's part of paying for product and rent by bad checks or improper drafts. These continuing defaults were of obvious concern to defendant Shell, inasmuch as they suggested that plaintiff Hinkleman was experiencing financial distress. Were plaintiff to institute bankruptcy or other insolvency proceedings because of his financial difficulties, Shell might expect to incur substantial losses inasmuch as plaintiff's indebtedness was not secured.

The reasons for plaintiff's financial distress are well documented by the record in this case. As this Court said in its Memorandum Opinion of May 8, 1990, (slip op. at 4, 15-16):

> That plaintiff has been experiencing extreme difficulty in his business affairs is apparent from the record here. Indeed, the overdraft of January 2, 1990 was symptomatic of plaintiff's continuing business difficulties, caused by changing market circumstances.

> Numerous other service stations have recently opened in close proximity to his own. Indeed, 22 gas stations are located within a three-mile radius of plaintiff's premises, including five Shell stations. Four Shell stations lie within a one-mile radius of plaintiff's operation. Also, a change in road configurations has lessened the traffic flow around plaintiff's station and has severely decreased his business volume. Increases in tank wagon prices of gasoline have further reduced Hinkleman's ability to sell gasoline at competitive prices.
>
> * * *
>
> It is apparent from the record here why plaintiff continues to be delinquent in paying sums owed to Shell under the franchise agreement. Indeed, direct evidence of his severe financial distress has been presented in this case by plaintiff himself. For several years, plaintiff has been ordering and selling less and less product. Recently, in December 1989, Shell substantially increased its dealer tank wagon price of gasoline, adversely affecting plaintiff's profit margin.[4] In 1984, Shell delivered to plaintiff some 271 tank loads. Since then the figures are as follows: 1985 - 180 loads; 1986 - 126 loads; 1987 - 123 loads; 1988 - 119 loads, and 1989 -109 loads. For the first four months of 1990, plaintiff has received 28 loads which would project to a figure of 84 loads for all of 1990.

Counsel for plaintiff Hinkleman argue that defendant Shell has the burden of proving not only that the termination was valid under the PMPA but also that the termination was not arbitrary, discriminatory or prextextual. As noted hereinabove, the statute itself places the burden on the franchisor of demonstrating that the termination was permitted under § 2802(b). *See* 15 U.S.C.

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[4] All Shell service stations in the area received similar increases.

§ 2805(c). However, neither the statute nor any of the cases cited by plaintiff's counsel require the franchisor to also prove that the termination was not arbitrary or discriminatory.

In any event, evidence does not exist to indicate that Shell's reason for the termination was pretextual.[5] As discussed hereinabove, Shell terminated the franchise because plaintiff failed to pay Shell in a timely manner when due sums to which Shell was legally entitled.

Relying on the deposition testimony of Johnson and Gill, plaintiff argues that Shell applied standards for the collection of sums owed by plaintiff which were different from those applied to other dealers. The evidence in question indicates, however, that each individual case of delinquency was dealt with on an *ad hoc* basis. None of the other dealers mentioned in the testimony had the lengthy history of bad checks and dishonored rent drafts that plaintiff had. Plaintiff was treated differently from other dealers because of his lack of creditworthiness and his continuing delinquencies even after receiving specific warnings from Shell. The facts of plaintiff's case were unique, and no inference of discrimination results from Shell's failure to terminate other dealers who may on occasion have been behind in paying amounts due Shell.[6]

Finally, plaintiff argues that Shell's administration of its variable rent program discriminated against plaintiff and targeted him for termination. The contention is without merit. Amounts owed by plaintiff for product and rent were determined

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[5] Plaintiff suggests that defendant arbitrarily terminated his franchise because of the pornographic magazines he was selling. The record as a whole does not support this assertion.

[6] Plaintiff's reliance on *Stobaugh v. Shell Oil Company*, Civil No. 90-1354-CIV-T-3A98(B) (M.D. Fla. Order dated November 19, 1990), is misplaced. In that case, there was clear evidence of a retaliatory and punitive motive for termination of the franchise because the plaintiff had brought a separate lawsuit against Shell.

by the terms of the franchise and rent agreements between the parties. If plaintiff was not satisfied with the terms of these agreements, he had every right in 1988 not to renew them. Plaintiff has never contended that he did not owe the amounts billed to him, nor that his delinquent payments were caused by Shell's overcharging him. It was not Shell's discriminatory application of the variable rent program[7] but rather plaintiff's lack of financial resources which resulted in the checks and rent drafts being dishonored by his bank. Plaintiff is apparently now asserting a claim of breach of contract, which is not an issue presented by the pleadings in this case.[8]

Plaintiff was not able to take advantage of Shell's variable rent program because for several years he has been ordering and selling less and less product. In any event, the rent charged by Shell and any discounts given particular dealers because of their outstanding performance were business decisions for Shell alone to make. Both the legislative history of the PMPA and the cases construing the statute make it clear that a court is not to substitute its own business judgment for that of the franchisor but is required by the Act merely to determine whether the franchisor's policies and the franchise requirements have some reasonable basis and are being applied in the normal course of business and in good faith. *Horcasitas v. Crown Central Petroleum Corp.*, 649 F. Supp. 1163, 1166 (D. Md. 1986) (Motz, J.). That Shell's policies and franchise requirements have a reasonable basis is supported by the facts of record in this case. The evidence before the Court does not indicate that Shell's

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[7] In its Memorandum and Order of October 5, 1990, this Court rejected plaintiff's contention that the variable rent program violated Maryland law.

[8] At oral argument, counsel for plaintiff indicated that plaintiff might seek leave to further amend the complaint to present a claim of breach of contract. Any such request would be denied. Pursuant to the Scheduling Order, it is much too late in this case for any further amendment of the complaint.

policies were dictated by a wrongful and discriminatory intent on defendant's part to remove plaintiff as a franchisee.

IV

Conclusion

For the reasons stated, defendant's motion for summary judgment will be granted. An appropriate Order will be entered by the Court.

_____

Chief, United States District Judge

DATED: December 26, 1990

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IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

FRANCIS GEORGE HINKLEMAN

Plaintiff

vs.

SHELL OIL COMPANY

Defendant

CIVIL NO. H-90-869

ORDER

For the reasons stated in the Court's Memorandum Opinion of today, it is this *26th* day of December, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion for summary judgment be and the same is hereby granted; and
2. That judgment is hereby entered in favor of defendant, with costs.

Chief, United States District Judge

APPENDIX D

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DENYING PRELIMINARY INJUNCTION

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

FRANCIS GEORGE HINKLEMAN

Plaintiff

vs.

SHELL OIL COMPANY

Defendant

CIVIL NO. H-90-869

MEMORANDUM OPINION

Presently pending in this civil action is a motion for a preliminary injunction filed by plaintiff, Francis George Hinkleman. Plaintiff is a Maryland resident who operates a retail service station at 103 Mountain Road in Pasadena, Maryland. Defendant is Shell Oil Company (hereinafter "Shell"), a Delaware corporation engaged in the refining and marketing of petroleum and related products. Plaintiff seeks to enjoin defendant from terminating the franchise agreement under which plaintiff is currently operating his Shell service station.

On March 23, 1990, plaintiff filed a complaint in this Court alleging that defendant was about to terminate the franchise between the parties in violation of the Petroleum Marketing

Practices Act, 15 U.S.C. § 2801 *et seq.* (hereinafter "the PMPA"). Plaintiff sought injunctive relief and damages. On April 11, 1990, plaintiff filed a motion for temporary restraining order (hereinafter "T.R.O.") and preliminary injunction. At a hearing held on April 16, 1990, defendant consented to the entry of a T.R.O., enjoining defendant from terminating the franchise until such time as a preliminary injunction hearing could be held. Memoranda in support of and in opposition to the pending motion for preliminary injunction have been submitted and reviewed by the Court. An evidentiary hearing has been held.

For the reasons to be stated, this Court finds and concludes that plaintiff's motion for preliminary injunction should be denied. Findings of fact and conclusions of law pursuant to Rule 52(a) are contained in this Memorandum Opinion.

I

Facts

Plaintiff has operated a retail service station at 103 Mountain Road in Pasadena, Maryland for approximately 12 years. From 1978 to 1985, plaintiff operated the service station pursuant to a franchise agreement with Atlantic Richfield Company (hereinafter "ARCO"). In 1985, the service station was sold by ARCO to defendant Shell. Since that date, plaintiff has operated the station under a franchise agreement with Shell.[1] The terms of the franchise agreement are contained in two written documents: (1) a "Dealer Agreement" under which plaintiff operates the service station; and (2) a "Motor Fuel Station Lease" under which plaintiff sells gasoline under the Shell trademark. These agreements were last renewed by the parties on July 26, 1988, to become effective by their terms on November 1, 1988, for a term of five years.

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[1] Plaintiff's business also includes the operation of a convenience store on the marketing premises.

On January 4, 1990, Shell sent to Hinkleman a certified letter containing a notice of termination of the franchise, to be effective on April 16, 1990. The basis for the termination was plaintiff's "failure to pay Shell in a timely manner when due all sums to which Shell is legally entitled." On December 21 and December 25, 1989, plaintiff had hand delivered to Shell two checks for separate deliveries of motor fuel. Both checks were presented for payment on January 2, 1990, and the next day one check was returned by the bank for insufficient funds, that being the check dated December 25, 1989. John Johnson, Shell's manager for the territory in which plaintiff's station was located, called Jeff Hinkleman, plaintiff's son,[2] and demanded immediate payment by certified check. According to the January 4 termination letter, plaintiff's son indicated that plaintiff had been aware of the threat of an overdraft and that he believed that funds might become available on January 5, 1990. Unwilling to wait and having earlier warned plaintiff that any further overdrafts would result in immediate termination of the franchise, Shell sent its notice of termination to plaintiff on January 4, 1990.

In support of his motion for a preliminary injunction, plaintiff argues that the overdraft on the checks was created by extenuating circumstances. Specifically, plaintiff asserts that his checking account was overwhelmed by the presentment of two checks at one time by Shell and by an unusually high number of electronic withdrawals made by a money order company. Plaintiff points out that a certified check in the full amount of the balance owed was delivered to Shell on January 5, 1990, and plaintiff insists that his failure to make this timely payment was a mere technical and minor matter of little importance to the franchise relationship. As a result, plaintiff argues, such failure cannot be the basis for the termination of a franchise relationship under the PMPA.

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[2] Plaintiff's son is the manager of plaintiff's service station.

That plaintiff has been experiencing extreme difficulty in his business affairs is apparent from the record here. Indeed, the overdraft of January 2, 1990 was symptomatic of plaintiff's continuing business difficulties, caused by changing market circumstances. Numerous other service stations have recently opened in close proximity to his own. Indeed, 22 gas stations are located within a three-mile radius of plaintiff's premises, including five Shell stations. Four Shell stations lie within a one-mile radius of plaintiff's operation. Also, a change in road configurations has lessened the traffic flow around plaintiff's station and has severely decreased his business volume. Increases in tank wagon prices of gasoline have further reduced Hinkleman's ability to sell gasoline at competitive prices.

The record here discloses a lengthy history of problems encountered by the parties because of plaintiff's failure to make timely payments of sums due under the franchise agreement. Since 1985, Shell has on many prior occasions experienced difficulty in obtaining timely payments from plaintiff for deliveries of petroleum products and also for payments of rent. Shell has previously received a number of checks from plaintiff which could not be negotiated because of insufficient funds in plaintiff's checking account. These bad checks, or dishonored rent drafts, were delivered or authorized by plaintiff beginning in July 1986 and continuing right up until the present.

Plaintiff argues that provisions of the new franchise agreement effective November 1, 1988 bar this Court from considering events which occurred before that date. Although the language in question would not appear to have the preclusive effect claimed by plaintiff,[3] it is not necessary to resolve this

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[3] Paragraph 26 of the agreement of November 1, 1988 provided that the parties respectively released each other "from all claims which each now has against the other (whether or not now known to either) arising. . out of or in connection with any such prior agreement or any sales or deliveries. . ., *excepting, however, claims of Shell against Dealer for indebtedness*, . . ." (Emphasis added).

question. Even disregarding any overdrafts which occurred Prior to the November 1, 1988 date, it is apparent that plaintiff has continuously been unable to keep his financial house in order. Overdrafts have occurred on five separate occasions after November 1, 1988, namely on September 20, 1989 for the sum of $9,448.14; on October 20, 1989, for the sum of $4,757.08 (electronic withdrawal)[4] ; on December 25, 1989, for the sum of $9,590.46; on January 9, 1990 for the sum of $10,195.76; and on March 16, 1990 for the sum of $5,675.26 (electronic withdrawal).

According to the terms of the franchise agreement, plaintiff was required to pay at the time of delivery for the petroleum products that he received from Shell. Indeed, because he had so often previously passed bad checks to Shell, plaintiff was at one time in 1989 placed on "certified funds status" whereby he was required to pay by certified check at the time of delivery the amounts due for petroleum products.

In the fall of 1989, relations between the parties deteriorated to such a point that on October 13, 1989, Shell sent a letter to Hinkleman informing him of the current deficiency in his account and warning him as follows:

> If payment by certified check or money order is not received in this office by close of business on that date, or if payment is received but your account is not kept current in the future, Shell will terminate your franchise relationship without further warning.

This letter of October 13 prompted plaintiff and his attorney to meet with a representative of Shell in an attempt to resolve his financial problems. On November 30, 1989, Shell sent another letter to plaintiff, setting forth the terms of a new understanding between the parties. Plaintiff was then taken off certified funds status with respect to payment for petroleum

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[4] Plaintiff had authorized defendant Shell to present a draft to his bank which would electronically withdraw the amount due as monthly rent.

deliveries but was again specifically warned that no further delinquencies in payment would be tolerated. The letter of November 30, 1989 stated in relevant part as follows:

> Our decision to rely on your creditworthiness stems from your assurance that you can maintain your account current. Given past indebtedness problems, we expect strict compliance by you in the prompt payment of debts. As Shell's attorney explained to both you and your counsel, the October 13, 1989 demand letter was the final one which Shell will issue on this account. . . . Since you have asked us to trust in your commitment to honor your debt obligations, Shell's acquiescence in doing so also results in a commitment to you that a termination notice will be issued in the event that we experience any further incident of indebtedness with you.

Even after this specific warning, plaintiff could not keep his accounts current. As noted, the check of December 25, 1989, was returned by the bank for insufficient funds when Shell attempted to negotiate it on January 2, 1990. Acting in accordance with its earlier written warning, Shell notified plaintiff of the termination of his franchise by letter dated January 4, 1990. Even after he had received the letter of January 4, 1990, the delinquencies continued. On January 9, 1990, plaintiff tendered a check in the amount of $10,195.170, which was also dishonored by the bank for insufficient funds. On March 16, 1990, when Shell attempted to withdraw plaintiff's monthly rent from his checking account as previously authorized by plaintiff, Shell was advised that funds were insufficient to cover the withdrawal.

Plaintiff filed this civil action seeking to avoid the termination of his franchise scheduled for April 16, 1990. Shortly before that date, plaintiff moved for a temporary restraining order and a preliminary injunction. By agreement of the Parties, a T.R.O

was entered to be effective until the motion for preliminary injunction could be heard. In his motion for a preliminary injunction, plaintiff has asked this Court to enjoin Shell from terminating the franchise relationship and to enter an Order permitting plaintiff to continue to operate his service station.

II

Applicable Legal Principles

The legal standards for the issuance of a preliminary injunction in this case are contained in § 105 of the PMPA, 15 U.S.C. § 2805(b)(2), which states as follows:

> (2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—
>
> (A) the franchisee shows
>
> > (i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and
> >
> > (ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and
>
> (B)the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

This statutory provision has been applied on numerous occasions by this and other district courts. It is well established that irreparable harm to the franchisee need not be shown and that, in any event, the loss of the franchise itself constitutes irreparable harm. *Eden v. Texaco Refining & Marketing Inc.*,

644 F. Supp. 1573, 1583 (D. Md. 1986) (quoting *Mobil Oil Corp. v. Vachon*, 580 F. Supp. 153, 156 (D. Mass. 1983). Moreover, a franchisee does not have to show a probability of success on the merits but only a reasonable chance of success. *Id.* Thus, the standard for granting injunctive relief under the PMPA is less demanding than that imposed by the typical four-prong analysis set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 196 (4th Cir. 1977).

Applying these principles to the facts of this case, this Court finds and concludes that plaintiff's motion for preliminary injunction should be denied.

III

Discussion

Initially, the Court concludes that plaintiff has satisfied in this case the requirements of §§ 2805(b)(2)(A)(i) and (b)(2)(B). Plaintiff's franchise relationship with Shell will be terminated immediately, unless this Court grants a preliminary injunction. Plaintiff has thus met his burden of production by demonstrating that Shell has sought to terminate the franchise. Moreover, the hardships imposed upon Shell by the issuance of an injunction would be less than the hardship which plaintiff and his family would suf fer if the injunction were not granted.

Accordingly, the only issue seriously disputed is whether in this case "there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation." 15 U.S.C. § 2805(b)(2)(A)(ii). *See, e.g., Horcasitas v. Crown Central Petroleum Corp.*, 649 F. Supp. 1163 (D. Md. 1986) (Motz, J.). Defendant Shell has the burden to demonstrate that the termination was valid under the PMPA. 15 U.S.C. § 2805(c). After considering the evidence produced, this Court finds and concludes that defendant has met its burden of showing that sufficiently serious questions going to the merits do not exist to make such questions a fair ground for litigation.

Both parties agree, as they must, that the PMPA recognizes as grounds for termination the "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise is reasonable." 15 U.S.C. § 2802(b)(2)(C). One of the various events which qualify as relevant is the "failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled." *Id.* § 2802(c)(8). However, in the definitional section of the PMPA, the term "failure" is said not to include those failures which are "only technical or unimportant to the franchise relationship" or which were caused by occurrences "beyond the reasonable control of the franchisee." *Id.* § 2801(13).

Plaintiff does not dispute that "failure" to pay monthly rents and other payments in a timely manner may be an event which is "relevant" to the termination of the franchise relationship. Defendant argues that plaintiff's admitted failure to present timely payments is *per se* a ground for termination of the franchise and that no further inquiry into the facts is necessary for the Court to deny the injunctive relief. On the other hand, plaintiff contends (1) that all the circumstances of termination of a franchise must be examined by the Court for reasonableness, and (2) that even if "failure" to make timely payment is a *per se* ground for termination, plaintiff's failure here was minor and technical and thus does not lie within the scope of the statutory authorization.

The Fourth Circuit has not directly addressed the question whether a franchisee's failure to make a timely payment is a *per se* ground for termination. The Circuits appear to be split concerning whether lack of timely payment in and of itself is sufficient for termination or whether the circumstances of each termination must be examined by the Court to determine whether the franchisor acted reasonably. *Compare Clinkscales v. Chevron U.S.A. Inc.*, 831 F.2d 1565, 1573 (11th Cir. 1987)

(lack of timely payment is *per se* ground for termination without need for judicial scrutiny) *with Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509 (6th Cir. 1989) (termination for late payment must be independently examined for reasonableness); *Sun Refining & Marketing Co. v. Rago*, 741 F.2d 670 (3d Cir. 1984) (same).

In this particular case, it is not necessary for the Court to decide this issue. After considering the evidence presented, this Court finds and concludes that defendant acted reasonably in deciding to terminate this franchise. Plaintiff's untimely payment constitutes a "failure" within the meaning of the PMPA and therefore provides a permissible ground for termination. Plaintiff's tendering of the bad check of December 25, 1989, cannot be classified as merely technical or minor, because plaintiff had explicitly promised, as documented in the letter of November 30, 1989, to promptly pay his debts. Plaintiff's inability to manage his checking account in a fiscally sound manner does not constitute a cause beyond his reasonable control. *See* 15 U.S.C. § 2801(13).

Since September of 1989, plaintiff has had an extremely poor credit history. A check dated September 21, 1989 in the amount of $9,448.14 was returned for insufficient funds. Although the bank made an error in returning this check, the amount due was not paid by certified check until almost a month later. Defendant had refused to accept a personal check when told that it would not clear for several days. On two separate occasions, once by its letter of October 13, 1989 and again by its letter of November 30, 1989, Shell warned plaintiff that the franchise would be terminated the next time that his account was not kept current. Yet plaintiff permitted an electronic draft of October 20, 1989 to be returned for insufficient funds and passed another bad check on December 25, 1989.

Plaintiff insists that the circumstances surrounding the overdrafts of the December 21 and 25 checks were quite unusual

and that he paid the full amount due by certified check made available on January 5, 1990. But plaintiff himself caused the problems that arose by issuing a large number of money orders before the checks delivered to Shell were presented for payment. If plaintiff delivered two checks to Shell on December 21 and December 25, 1989, Shell hardly acted unreasonably by drawing on plaintiff's checking account and presenting these checks on January 2, 1990.

Plaintiff further argues that the two letters of October 13, 1989 and of November 30, 1989 were not justified under the circumstances because plaintiff had a right to and in fact did readily cure these existing overdrafts. This Court would disagree. The franchise agreement did not provide for a cure period. Plaintiff's past practice of remitting overdrawn checks understandably prompted Shell to be unwilling to permit a cure period for future bad checks.

This is not a case in which a franchisor seeks to terminate a franchise because a single check bounced. Between September 21, 1989 and March 16, 1990, there were five occasions in which checks for product or rent drafts were returned. Three of these occurred after plaintiff had been specifically warned that the franchise would be terminated if there was one more failure on plaintiff's part to pay sums due. In his testimony, plaintiff advanced explanations for these defaults which can only be described as flimsy. The checks in question bounced because plaintiff's deteriorating business left him without ready cash to meet his obligations and because his shoddy bookkeeping practices did not reveal to him that his bank account would be overdrawn when he wrote a particular check.

It is argued that the Court cannot consider the defaults of January 9, 1990 and March 16, 1990 because they occurred after the notice of termination of January 4, 1990. This Court would disagree. These later defaults are highly relevant as proof of a pattern on plaintiff's part to pay for product and rent by bad

checks or drafts. The evidence indicates that such a long standing pattern can be expected to continue in the future and that Shell did not take precipitous action when it sent the letter of termination.

Plaintiff says that he has now made borrowings which will prevent defaults in the future. Such assurances have a hollow ring. Both in October and in November of 1989, plaintiff promised that he would keep his account current in the future. Even though he had been twice warned of the drastic consequences if he did not fulfill these promises, there were three separate occasions after November 30, 1989 when further defaults occurred.

Finally, plaintiff suggests that Shell has unjustly refused to provide assistance to plaintiff's business, which has fallen allegedly through no fault of his own. Plaintiff refers to Shell's Variable Rent Program which allows for reductions in a franchisee's fixed costs, including rent, should the franchisee pump a certain volume of gasoline. Plaintiff asserts that Shell has set a "throughput level" for the volume of gasoline to be pumped by him which is unrealistically high. However, this was a business decision for Shell to make as was the increase in tank wagon prices which was put into effect in December of 1989. As Judge Motz of this Court stated in *Horcasitas, supra* at 1166:

> Both the legislative history of PMPA and the cases construing PMPA make clear that this Court is not to substitute its own business judgment for that of the franchisor but simply to determine whether the franchisor's policies and franchise requirements have some reasonable basis and are being applied in the normal course of business and in good faith. *See, e.g.*, S.Rpt. No. 731, 95th Cong., 2d Sess., 37 (1978) *reprinted in* 1978 U.S. Code Cong. and Ad.News, 873, 895-96; *Brach v. Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982); *Crown Central Petroleum Corp. v.*

Waldman, 515 F.Supp. 477 (M.D. Pa. 1981) *aff'd*, 676 F.2d 684 (3d Cir. 1982).

On the record here, this Court concludes that Shell's business decisions concerning the pricing of its products and the operation of its Variable Rent Program were reasonable. The evidence does not support plaintiff's claim that Shell's policies were dictated by a wrongful intention to remove him as a franchisee. Under the circumstances of this case, this Court cannot conclude that defendant's business decisions were unreasonable ones.

It is apparent from the record here why plaintiff continues to be delinquent in paying sums owed to Shell under the franchise agreement. Indeed, direct evidence of his severe financial distress has been presented in this case by plaintiff himself. For several years, plaintiff has been ordering and selling less and less product. Recently, in December 1989, Shell substantially increased its dealer tank wagon price of gasoline, adversely affecting plaintiff's profit margin.[5] In 1984, Shell delivered to plaintiff some 271 tank loads. Since then the figures are as follows: 1985 - 180 loads; 1986 - 126 loads; 1987 - 123 loads; 1988 - 119 loads, and 1989 - 109 loads. For the first four months of 1990, plaintiff has received 28 loads which would project to a figure of 84 loads for all of 1990.

The reasons for this alarming deterioration of plaintiff's business operations are well documented. There are simply too many service stations in plaintiff's marketing area. Twenty-two stations are located within a three-mile radius of plaintiff's premises, five of which are Shell stations. There are four Shell stations within a one-mile radius. In 1988, Route 10 was opened which diverted traffic around plaintiff's Mountain Road location, causing a serious decrease in traffic flow and business volume. Also, in 1988, the State placed a 375 foot concrete

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[5] All Shell service stations in the area received similar increases.

barrier in the adjoining roadway blocking two entrances to plaintiff's station and causing customers to select other more convenient stations.

Although these factors explain why so many of plaintiff's checks bounced, they hardly excuse the obligation which plaintiff had to pay sums due in a timely manner. Financial distress is certainly relevant to a franchise relationship, and it has been held that termination of a franchise for financial distress is not arbitrary. *Moody v. Amoco Oil Company*, 734 F.2d 1200, 1217 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984). The PMPA imposes no duty on Shell to excuse continuing failures on the part of plaintiff to comply with the franchise agreement.

It is apparent that plaintiff's irresponsible bookkeeping practices were the immediate cause of the return of these checks for insufficient funds. Plaintiff would regularly write and deliver checks willy-nilly, without even knowing the balance available in his business checking account. No record was kept of such balance; rather, plaintiff would determine from the bank at the end of each day the balance available. Not surprisingly, many checks and drafts bounced. It was this totally unacceptable business practice which resulted in repeated returns of checks and drafts to Shell because of insufficient funds in the bank account.

For all these reasons, this Court concludes that defendant Shell has met its burden of showing that its termination of this franchise is valid under the PMPA. Plaintiff has on several prior occasions failed to pay to Shell in a timely manner when due sums to which Shell was legally entitled. In this case, there do not exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation.

IV

Conclusion

For all the reasons stated, this Court will deny plaintiff's motion for preliminary injunction. An Order will be entered requiring plaintiff to promptly vacate the premises pursuant to the termination letter of January 4, 1990.

_____

Chief, United States District Judge

DATED: May 8, 1990

D16

IN THE

United States District Court

FOR THE DISTRICT OF MARYLAND

FRANCIS GEORGE HINKLEMAN

Plaintiff

vs.

SHELL OIL COMPANY

Defendant

CIVIL NO. H-90-869

ORDER

For the reasons stated in the Court's Memorandum Opinion of today, it is this 8th day of May, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiff's motion for preliminary injunction be and the same is hereby denied; and
2. That plaintiff shall surrender his service station to defendant on or before May 21, 1990.

Chief, United States District Judge

APPENDIX E

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING

FILED: July 31, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2328
(CA-90-869-H)

FRANCIS GEORGE HINKLEMAN,
Plaintiff-Appellant,

versus

SHELL OIL COMPANY,
Defendant-Appellee.

CORRECTED ORDER

The Court corrects its order issued July 28, 1992 as follows:

The majority of the panel voted to deny the petition for rehearing and denied the motion of the *amicus curiae* to participate in oral argument on the request for rehearing *en banc*. A poll of this Court was taken on the suggestion for rehearing *en banc*, and Judge Wilkins, Judge Sprouse and Judge Williams voted for such rehearing *en banc*. Judge Wilkinson is disqualified in this case. Chief Judge Ervin, Judge Russell, Judge Widener, Judge Hall, Judge Phillips, Judge Murnaghan, Judge Niemeyer, Judge Hamilton and Judge Luttig voted against rehearing *en banc*.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing *en banc* is denied.

For the Court

/s/ Donald Stuart Russell

For the Court

Supreme Court, U.S.
FILED
NOV 23 1992
OFFICE OF THE CLERK

No. 92-714

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN,
Petitioner

v.

SHELL OIL COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do tendering of checks that are dishonored upon presentment and maintaining insufficient funds in a bank account designated for electronic drafts constitute one or more occurrences of an event which is relevant to the franchise relationship and as a result of which termination of the franchise is reasonable under 15 U.S.C. § 2808 (b) (2) (C)?

II. Do the prohibitions contained in Section 11-204 (a) (5) of Maryland's Commercial Law Article regarding discriminatory provision of services or facilities apply to leases of real estate?

LIST OF PARTIES

The following entities are subsidiaries of Shell Oil Company that are not wholly owned:

GRAVACP, Inc.

Loop, Inc.

Agripro Biosciences Inc.

Pecten Middle East Services Company

Plumbing Claims Group, Inc.

CRI Far East Trading Company Limited

Catalyst Recovery Europe S.A.

CRI-SAM, Ltd.

Nippon CRI, LTD.

Pecten Cameroon Company

Al Furat Petroleum Company

Columbia LNG Corporation

East Texas Salt Water Disposal Company

Cortez Capital Corporation

Van Salt Water Disposal Company

Dixie Pipeline Company

Locap, Inc.

West Shore Pipe Line Company

Premix/E.M.S. Inc.

Inland Corporation

Mesbic Financial Corporation of Houston

Oil Insurance Limited

Saudi Petrochemical Company

CRI International, Inc.

CRI Europe S.A.

Catalyst Technology Europe S.A.

Catalyst Technology S.A.R.L.
Criterion Catalyst Company
Pecten Portugal Company S.A.R.L.
Taranaki Offshore Petroleum Company Limited
Shell Frontier Oil & Gas Inc.
Grande Ecaille Land Company, Inc.
Shell Frontier Services Inc.
Butte Pipe Line Company
Explorer Pipeline Company
Plantation Pipe Line Company
Wolverine Pipe Line Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-714

FRANCIS GEORGE HINKLEMAN,
Petitioner

v.

SHELL OIL COMPANY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner George Hinkleman is a former owner of a service station franchise with Shell Oil Company ("Shell") located in Pasadena, Maryland. Hinkleman became a franchisee of Shell in 1986 when Shell bought the Atlantic Richfield Company stations in the area. At that time, the parties entered into a dealer agreement and a lease for the service station premises. The parties renewed both contracts in November 1988. (JA 81-106)

During the period September 21, 1989 to March 16, 1990, Hinkleman made five late payments of gasoline and

rent to Shell. Three late payments were checks returned for insufficient funds. Those insufficient funds checks were given in exchange for loads of gasoline. The price of a single load of gasoline is substantial. For example, taking the three late payments for gasoline Hinkleman made from September 1989 to March 16, 1990, the average price per load was $9,744.78. (JA 509).[1]

Hinkleman delayed rectifying his payment problems. The dishonored check of September 21 was not replaced with a certified check for over a month. While that payment was outstanding, Hinkleman still owed Shell approximately $1,500.00 on his trade statement for promotional and other materials. The balance had been outstanding for over a year.[2] Later in October, when Shell attempted to withdraw Hinkleman's monthly rent, the electronic draft failed for insufficient funds. By the end of October 1989, Hinkleman's indebtedness to Shell from the trade statement, the petroleum products delivered in September, and the rent overdraft had climbed to more than $15,000.00. (JA 111, 118).

Nevertheless, Shell took no precipitous action. It negotiated with Hinkleman and his attorney, resolved the trade account problem, and eliminated its requirement that Hinkleman pay for gasoline by certified check. However, on November 30, 1989, Shell issued a warning to Hinkleman that "a termination notice will be issued in the event that we experience any further incident of indebtedness with you." (JA 119-121). A month later, Hinkleman tested Shell's resolve.

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[1] The high price of a load of gasoline is just one reason that Hinkleman's payment record cannot be fairly compared to those of other dealers to whose records Hinkleman alluded. (Petition for Writ of Certiorari, hereafter "Pet.," at 6). Those dealers' late payments related to rent or trade statement obligations. *Id.*

[2] Hinkleman disputed only two minor items on the entire bill. (JA 293-294).

On December 25, 1989, Hinkleman wrote a check in the amount of $9,590.46 to Shell for a gasoline delivery. The check was returned by the bank for insufficient funds. Shell presented the check for payment on January 2, 1990, the first business day after the New Year's holiday. Consistent with Shell's prior warning, it notified Hinkleman on January 4, 1990, that it was terminating the franchise.

The late payments did not stop with the notice of termination. On January 9, 1990, Hinkleman wrote a check in the amount of $10,195.70 in payment for delivery of petroleum products which was dishonored for insufficient funds. On March 16, 1990, Shell was unable to withdraw Hinkleman's monthly rent from his bank account because the account's funds were insufficient to cover the payment.

Before the termination was to take effect, Hinkleman filed suit and moved for a preliminary injunction from the United States District Court for the District of Maryland to prevent the termination. His theory then is similar to what it is now: Hinkleman's failure to pay timely is unimportant and his termination was unreasonable because he replaced bounced checks, because he thinks his payment history was not as grievous as that of others, because his failure to pay timely stemmed from Shell's failure to reduce his contractually agreed upon rent by manipulating its Variable Rent Program against him, and because Shell deliberately tried to 'catch' Hinkleman in a payment problem by cashing at the same time two of the checks he had written to Shell.

After a hearing, the District Court[3] denied Hinkleman's motion for a preliminary injunction.[4] Hinkleman filed an amended complaint adding a count under the

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[3] Then Chief, now Senior, United States District Judge Alexander Harvey, II, presided.

[4] Shell had consented to entry of the temporary restraining order.

Maryland Antitrust Act based upon Shell's Variable Rent Program. Upon Shell's Rule 12(b)(6) motion, the District Court dismissed Hinkleman's claim under the Maryland Antitrust Act. Following a hearing, it granted Shell's motion for summary judgment on a claim brought under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"). The Fourth Circuit affirmed per curiam the District Court's grant of summary judgment on the PMPA claim. It affirmed the District Court's dismissal of the Maryland Antitrust Act claim by a two-to-one vote. Hinkleman petitioned for a rehearing. Shell opposed the petition. On July 28, 1992, the Fourth Circuit Court of Appeals denied Hinkleman's Petition for Rehearing by a vote of nine to three. Hinkleman has now petitioned this Court for a Writ of Certiorari. Shell opposes the Petition.

REASONS FOR DENYING THE WRIT

I. THE PMPA CAUSE OF ACTION.

A. Resolution of the Conflict Is Irrelevant to the Ultimate Outcome of This Case.

This case is a poor vehicle for review of the standard which the courts of appeal should apply in determining whether termination of the service station franchise was lawful under the PMPA. 15 U.S.C. § 2802. Among the courts of appeal, there are two views on how to approach a termination of a service station franchise for failure to pay timely under the PMPA. One view is to regard termination for failure to pay in a timely manner (§ 2801(c)(8)) as a per se ground for termination of the franchise. The other requires that terminations for late payment be independently examined for reasonableness. The outcome of this case will not be affected by a resolution of the conflict. In granting Shell's motion for summary judgment, the District Court concluded as a matter of law that Shell's termination of the Hinkleman franchise was reasonable and lawful under the statute regardless of the test used. (Pet. at C9) Therefore, under either

view, termination of the Hinkleman franchise is lawful under the PMPA.

B. The Apparent Split of Authority Among the Circuits on Which Test to Apply Has Made Little Difference In This Area.

The conflict among the Circuits regarding what test to apply to determine whether a termination of a franchise is lawful is more apparent than real. Since the PMPA was enacted in 1978, there have been only a handful of reported cases dealing with the issue of failure to pay timely.[5] Of those, even among the Circuits that apply a reasonableness test, not one has overturned a termination.

Operation of the statute as a whole may have harmonized the two positions. Before it applies either test under Section 2802(c), a court must first decide whether there has been a "failure." The Act defines "failure" by eliminating "(A) any failure which is only technical or unimportant to the franchise relationship; or (B) any failure for a cause beyond the reasonable control of the franchisee." 15 U.S.C. § 2801(13). Thus, despite a technical difference in approaching Section 2802(c), the definition of "failure" in Section 2801(13) may have had the practical effect of bringing together the two positions. The Fourth Circuit Court of Appeals recognized this point when it observed that "[a] specific, limited reasonableness requirement is incorporated into the statute through section 2801(13)...." (Pet. at A10).

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[5] They are: *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509 (6th Cir. 1989); *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565 (11th Cir. 1987); *Sun Ref. & Mktg. Co. v. Rago*, 741 F.2d 670 (3d Cir. 1984); *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Baker v. Amoco Oil Co.*, 761 F. Supp. 1386 (E.D. Wis. 1991), *aff'd*, 956 F.2d 639 (7th Cir. 1992); *California Petroleum Distribs. Inc. v. Chevron U.S.A. Inc.*, 589 F. Supp. 282 (E.D.N.Y. 1984); *Cantrell v. Exxon Co. U.S.A.*, 574 F. Supp. 313 (M.D. Tenn. 1983); and *Loomis v. Gulf Oil Corp.*, 567 F. Supp. 591 (M.D. Fla. 1983).

C. The Fourth Circuit's Decision Is Not An Extension of the Per Se Termination Rule.

Hinkleman characterizes the Fourth Circuit's opinion as an extension of the per se rule of termination. (Pet. at 13-14). He argues that by rejecting the view of some courts which had considered the issue of pretext, the Fourth Circuit somehow extended the per se termination interpretation. (Pet. at 13). Hinkleman is wrong. The Fourth Circuit's opinion is indistinguishable from those of the other courts adopting the per se analysis. It adopted without change the position of the Eleventh Circuit Court of Appeals in *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565 (11th Cir. 1987) and of the Second Circuit Court of Appeals in *Russo v. Texaco*, 808 F.2d 221, 223 (2d Cir. 1986), among others, on the issue of reasonableness per se. (Pet. at A12).

Furthermore, Hinkleman never explains how the Fourth Circuit's opinion purportedly differs from that of other cases adopting the per se rule. Rather, he compares the Fourth Circuit's decision to *another* group of cases—not one of which concerns termination for late payment and all but one of which arises out of a nonrenewal situation.[6] On closer inspection, these cases merely establish the propriety of the pretext analysis when the PMPA explicitly provides for an inquiry into whether the franchisor acted in good faith.[7] No such

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[6] The only case cited by Hinkleman that applies a pretext analysis outside the nonrenewal context is *Gilderhus v. Amoco Oil Co.*, 470 F. Supp. 1302 (D. Minn. 1979). *Gilderhus* dealt with the factually distinguishable situation of franchisor who had been sued by the franchisee to enforce his rights under the contract. The franchisee was terminated during the course of litigating his claim.

[7] Those situations are embodied in four subsections of the PMPA: nonrenewal or termination because of withdrawal from the geographic territory § 2802(b)(2)(E); nonrenewal because of failure to agree to changes or additions to the contract § 2802(b)(3)(A)(i); nonrenewal because of an economic decision to buy, sell, convert or discontinue the premises § 2802(b)(3)(D); and termi-

provision applies to this case.[8] Thus, it is Hinkleman who is seeking an unfounded extension of current law.[9]

Alternatively, Hinkleman urges the Court to liken the PMPA to civil rights statutes and to adopt a pretext inquiry in "the absence of language mandating such inquiry. . . ." (Pet. at 15). In essence, he would have the Court impose a duty of good faith over and above the duty to comply with the statutory requirements for termination. Such a construction would thwart rather than further Congress' intent regarding the PMPA. *Smoot v. Mobil Oil Corp.*, 722 F. Supp. 849 (D. Mass. 1989); *W & S, Inc. v. Atlantic Richfield Co.*, Bus. Franchise Guide (CCH) ¶ 8207 (N.D. Cal. 1984).

Unlike civil rights legislation, which broadly outlaws discriminatory conduct without enumerating what action can and cannot be engaged in, the PMPA sets forth specific grounds for termination and affirmative notification requirements the franchisor must follow before the termination will be deemed lawful. By incorporating these guidelines into the statute, Congress already has established protection from discriminatory or arbitrary terminations for franchisees. S. Rep. No. 731, 95th Cong., 2d Sess. 15, 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874. *See Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22,

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nation or nonrenewal based upon the franchisor's loss of right to grant the use of the trademark § 2802(c)(6). *See generally Smoot v. Mobil Oil Corp.*, 722 F. Supp. 849, 856 (D. Mass. 1989).

[8] Scrutiny of the franchisor's motive might make sense when the termination or nonrenewal results from actions taken by the franchisor, as it does in the four subsections containing the good faith requirement. When, as here, termination arises from the conduct of the franchisee, "[t]he . . . conduct can be objectively measured against the requirements of 15 U.S.C. § 2802(b)(2)." *Crown Central Petroleum Corp. v. Waldman*, 515 F. Supp. 477, 485 (M.D. Pa. 1981), *aff'd*, 676 F.2d 684 (3d Cir. 1982); *Smoot*, 722 F. Supp. at 857.

[9] In any event, the District Court found that the record did not support Hinkleman's claim of pretext. (Pet. at C15).

25 (1st Cir. 1987) (PMPA establishes minimal federal standards governing termination). To go further would upset the balance between the interests of franchisors and franchisees that Congress placed in the statute and undermine Congress' intent to preserve "the legitimate needs of the franchisor to be able to determine a franchise . . . based upon certain actions of the franchisee, including certain failures to comply with contractual obligations. . . ." S. Rep. No. 731, 95th Cong., 2d Sess. 15, 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874, 877. For these reasons, the courts below correctly rejected Hinkleman's construction of the statute. *See* Pet. at A9-10 and C15.

II. THE MARYLAND ANTITRUST ACT.

A. The Issue Presented Affects Only One State.

Hinkleman has made only one antitrust claim against Shell. The claim is based upon an alleged violation of the Maryland Antitrust Act, Md. Com. Law Art. § 11-204 (a)(5). Thus, the only issue that would be before this Court on review of the Fourth Circuit's opinion affirming dismissal of Count II of the Complaint is the proper construction of a Maryland statute. Contrary to Hinkleman's suggestion, there is no issue presented under the Robinson-Patman Act.[10] Since there is no Robinson-Patman claim before the Court, any ruling on the proper interpretation of that Act would be dicta and so of little assistance to the courts below. *See Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) (lack of weight to be afforded dictum).

The issue actually presented in this case is whether Section 11-204(a)(5) of Maryland's Commercial Law Article applies to leases of real estate. The only matter

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[10] The Robinson-Patman Act is a popular name given to § 2 of the Clayton Act. In the United States Code, it appears at 15 U.S.C. § 13. Section 2(e) of the Robinson-Patman Act is 15 U.S.C. § 13(3). For simplicity, references to the federal statute will be to § 2(e) and the Maryland statute to § 11-204(a)(5).

this Court can determine is whether the Court of Appeals correctly concluded it does not. This Court avoids second-guessing a court of appeals on the proper interpretation of state law. *See Haring v. Prosise*, 462 U.S. 306, 313 (1983).

B. The Fourth Circuit Applied State Law.

Seeking to expand the narrow issue of whether the Fourth Circuit correctly applied Section 11-204(a)(5) of the Maryland antitrust statute, Hinkleman asserts that the Fourth Circuit's decision amounted to "federal pre-emption" of state legislation. His assertion is wrong both as a matter of procedure and substance.

Although the Fourth Circuit applied standards and principles derived from the Robinson-Patman Act, it did so solely to interpret analogous state law.[11] The Fourth Circuit determined whether the state law, which it recognized as controlling, differed from the corresponding section under the federal Robinson-Patman Act. (Pet. at A14, n.8). Having considered—and rejected—the notion that the Maryland Act, by its terms, included real estate leases within its scope, the Fourth Circuit eliminated any distinction which could be drawn between the Section 2(e) and § 11-204(a)(5), and then properly proceeded to analyze the claim under the developed body of federal law. *See* Section 11-202(a)(2).[12]

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[11] The Fourth Circuit's reliance on the body of law interpreting the Robinson-Patman Act was proper. The Maryland Antitrust Act provides that the law was enacted to complement the body of federal antitrust laws (Md. Com. Law Code Ann. § 11-202(a)(1).) Further, the Act directs that federal court interpretations guide interpretation of the Maryland antitrust laws. *Id.* at Section 11-202(a)(2).

[12] Analysis for federal preemption proceeds in the reverse direction. To determine if a state law is preempted, the Court first must focus on the federal law to determine Congress' intent regarding its scope. Then it proceeds to analyze the state law to determine whether or not there is a conflict. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986).

Hinkleman may quarrel with the outcome of the Fourth Circuit's analysis regarding the significance or lack of significance of the presence of the word "leasing" in the definition of the word "service" under the Maryland Act,[13] but he cannot convincingly maintain that the issue was not considered.[14] For this reason and the reasons that follow, Hinkleman lacks any basis for claiming that Fourth Circuit "has essentially preempted the Maryland Act in favor of its restrictive RPA interpretation." (Pet. at 24).

C. The Interpretations of the Robinson-Patman Act the Fourth Circuit Used As a Guide Are Well Established.

Hinkleman takes the Fourth Circuit Court of Appeals to task for interpreting Section 2(e) of the Robinson-Patman Act in such a way as to limit its scope to prohibiting discrimination through advertising, merchandising and promotional services or facilities. The Fourth Circuit's interpretation hardly was novel. It followed decades of interpretative precedent provided by federal

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[13] It is noteworthy that when the judges of the Fourth Circuit voted on Hinkleman's Petition for Rehearing on July 28, 1992, the two judges from Maryland (Judges Niemeyer and Murnaghan) voted to deny the Petition. (Pet. at E1). Typically, this Court defers to interpretations of the Court of Appeals as the expert tribunal on state law issues for states that are in the circuit. *See Butner v. United States*, 440 U.S. 48, 58 (1979).

[14] In any event, based on the statutory structure, there is considerable question whether the statutory definition of "service" applies to § 11-204(a)(5). Moreover, if it does apply, the only effect of § 11-204(a)(2) is to describe the broad range of items that can constitute a "service" within the statute as a whole. In no way does the definition override limitations that properly restrict the term in a particular subsection. Where, as here, Section 11-204(a)(5) is limited to services principally intended to promote resale; the definitional section does not bring within its ambit a "service" (such as a lease of real estate) that has no connection to resale.

courts and the Federal Trade Commission [15] and the language, history and purpose of the Act.

In particular, the Court of Appeals relied on a long line of precedent holding that Section 2(e) relates solely to services and facilities that are promotional. *E.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1317 (9th Cir. 1979); *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910-11 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); and *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 851 (N.D. Tenn. 1974). Other cases are in accord: *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1424 (11th Cir. 1990) (advertising and promotional programs are services and facilities); *John Peterson Motors, Inc. v. General Motors Corp.*, 613 F. Supp. 887, 898 (D. Minn. 1985) (aimed at advertising, merchandising and other promotional services); *Herbert R. Gibson*, 95 F.T.C. 553, 725, *modified*, 96 F.T.C. 126 (1980), *aff'd*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) ("the service . . . must be promotional in nature, such as for advertising").

The Federal Trade Commission has made the same determination in its *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. §§ 240.1-240.15 (1992).[16] The Guides unequivocally state that Section 2(e) applies "only to" a seller who . . .

> (4) Furnishes promotional services or facilities to a customer

---

[15] The Federal Trade Commission has the authority to enforce the Federal Trade Commission Act and its views are to be accorded respect by the courts. *FTC v. Borden Co.*, 383 U.S. 637, 640 (1966).

[16] The Commission promulgated these Guides in 1969 at the invitation of the Supreme Court in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 362 (1968). They were revised in 1972 and 1990. They are sometimes called the "Fred Meyer Guides."

> (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's product.

Further, the Guides state that promotional services or facilities:

> . . . have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples—the list is not exhaustive—of promotional services and facilities covered by sections 2(d) and (e):
>
> Cooperative advertising;
> Handbills;
> Demonstrators and demonstrations;
> Catalogues;
> Cabinets;
> Displays;
> Prizes or merchandise for conducting promotional contests;
> Special packaging, or package sizes.[17]

Hinkleman's reliance on the decision in *Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585, 587 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) is misplaced. In the twenty-one years since it has been decided, not only has no other court adopted its reasoning, but the Seventh Circuit has apparently retreated from the position it had announced in *Centex*. *Compare Kirby v. P.R. Mallory & Co.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974) (distinguishing indirect price discrimination with promotional discriminations). In short, the Fourth Circuit Court of Appeals' interpreta-

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[17] 16 C.F.R. § 240.7 (1992). In the forty-five years since the Robinson-Patman Act was enacted, a real estate lease has never been found to fall within the scope of Section 2(e).

tion of the Robinson-Patman Act is entirely in accord with well-recognized federal authorities and provides no basis for review.

CONCLUSION

For the foregoing reasons, Shell respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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92-714

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

Francis G. Hinkleman, Petitioner
vs.
Shell Oil Co., Respondant

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND AMICUS CURIAE BRIEF OF SERVICE STATION DEALERS OF AMERICA
SOUTH CAROLINA SERVICE STATION ASSOCIATION
NATIONAL ASSOCIATION OF AMERICAN FRANCHISEES

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MOTION FOR LEAVE TO FILE

The Service Station Dealers of America, South Carolina Service Station Association, and National Association of American Franchisees hereby make this Motion for Leave to file the attached Amicus Brief in support of the Petition for a Writ of Certiorari. Counsel for Petitioner has consented to the filing, consent from Counsel for Respondant has not been obtained.

In support thereof Amici state:

1. The SSDA and NAAF are national trade associations representing gasoline retailers and other franchisees, representing over 120,000 gasoline franchised businesses. The SCSSA represents over 500 independent gasoline retailers in the state of South Carolina.

2. The issues raised by the Petition of grave concern to all 3 associations. The proper interpretation of the PMPA is particularly important to the SSDA,and SCSSA. Both groups believe that the Fourth Circuit either did not take into account, or did not have before it crucial legislative history of the PMPA. As a result, the Court has issued what is without doubt the most

restrictive per se termination rule in the annals of PMPA litigation. Moreover, this is the first decision we are aware of that rejects the well settled principle that a franchisors' discriminatory treatment of a given dealer is irrelevant in a PMPA termination action. As this decision conflicts with previous decisions of at least 3 other Circuits, leave to file is sought so that the Court may have the benefit of other decisions and legislative history in informing its decision on whether to grant certiorari.

3. The Robinson - Patman issues raised are of grave concern to all 3 associations. SCSSA in particular is concerned that the ruling de facto preempts important South Carolina trade regulation statutes.

The SSDA and NAAF are particularly appalled at the ruling, which is contrary to a long line of Supreme Court precedent, and to the legislative history of the Robinson-Patman Act. As active participants before the Supreme Court in recent RPA cases such as Texaco Inc. v. Hasbrouck, we believe that we can bring to tyhe Court a national perspective on these issues of extreme importance to gasoline retailing, an industry that affects the lives of nearly every American on a daily basis, as well as the other industries

represented by NAAF.

4. The Associations have come together on a joint filing to avoid the burden of multiple filings.

5. The Court has previously granted leave to file Amicus Briefs to the SSDA both in support or opposition to Petitions for Certiorari, as well as on the merits in the past, and has cited those briefs in its opinions.

Respectfully submitted,

Dimitri G. Daskalopoulos

Dimitri G.Daskalopoulos

QUESTIONS PRESENTED

1. Does Section 102 (b)(2)(C) of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et.seq., allowing termination of a franchise upon "the occurance of an event making termination reasonable"
allow for a Court to make an inquiry into the objective reasonbleness of the termination, including factors such as pretext, or arbritrary and discriminatory treatment ?

2. Is Section 2 (e) of the Robinson - Patman Act limited in application to the providing of advertising and promotional services, or does it apply to the providing of facilities as well?

If the Act does apply to facilities, is a gasoline service station such a facility ?

3. Is the discriminatory providing of a facility in connection with the resale of a commodity addressable under Section 2 (a) of the Robinson-Patman Act, Section 2 (e) of that Act, or both ?

DISCUSSION

The Service Station Dealers of America, South Carolina Service Station Dealers Association, and National Association of American Franchisees submit this amicus curiae brief in support of Petitioner's Application for a Writ of Certiorari, and would also ask the Court to consider the question of whether the discriminatory providing of a facility in connection with the resale of a commodity should be addressed under Section 2(a) of the Robinson-Patman Act, Section 2 (e) or both. This Court

has not heard a case under the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et. seq., since that law was adopted in 1978. The Act has been the subject of numerous conflicting interpretations of various issues, including those presented in the Petition, upon which there is a 3 to 3 split in the Circuits.

The opinion of the Fourth Circuit, adopting a per se termination rule under Section 102 (b)(2)(C) of the Petroleum Marketing Practices Act is contrary to the language of the statute, the legislative history of the provision (which is not addressed in that Court's opinion), and is in irreconcilable conflict the law of three other Circuits. The opinion will

continue to cause uncertainty and needless litigation, in an industry that affects the life of nearly every American on a daily basis.

The writ should also be granted in order to review the critical Robinson-Patman issues in this case. First, there is a need for this Court to address the issue of what constitutes a "service or facility" under Section 2 (e) of the Robinson-Patman Act, an issue that has not been addressed since the decision in F.T.C. v. Simplicity Pattern Co., 360 U.S. 55 (1959).

Next, the Fourth Circuit held that discriminations of the type alleged in this case should be addressed solely under Section 2 (a)

of the Act; rather than 2 (e) because Section 2 (e) does not permit the cost justification defense. This is an issue that has also been subject to conflicting interpretations. See generally, Note, The Distinction Between the Scopes of Section 2 (a) and Sections 2 (d) and 2 (e) of the Robinson-Patman Act, 83 Mich. L. Rev. 1584.

The issue of whether a given practice should be addressed under Section 2(a) as opposed to Sections 2 (d) or (e), or addressed under both provisions [(a) and (d) or (e)] has been left open by this Court since the 1968 decision in F.T.C. v. Fred Meyer Inc., 390 U.S. 341 (1968). The holding of the Fourth Circuit squarely raises

this question, therefore it should be reviewed by this Court.

The plurality opinion based its intrepretation on a claim that the Robinson-Patman Act adopted the neo-classical definition of "consumer welfare" as its sole goal, to the exclusion of other goals, such as the protection of competition through the protection of small business competitors. This holding has absolutely no support in the history of the Act.

The decision in effect preempts the law not only of the state of Maryland, but statutes in each of the states of the Fourth Circuit.

This Court, as recently as its

1989 decision in California v. ARC America , 490 U.S. 93 (1989), has repeatedly held that state antitrust and trade regulation laws are NOT preempted by their federal counterparts. See also, Department of Consumer Affairs v. Isla Petroleum Corp., 490 U.S. 1384 (1989).

By imposing its interpretation (a distorted one at that) of federal law on a state statute whose plain language differs from the federal law, the Fourth Circuit plurality has de facto preempted the state statute, and worse, has engaged in precisely the type of "judicial legislating" which this Court expressly refused to do in rejecting the "automatic damages" rule under the Robinson- Patman Act in J.

Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981).

Amici belief that the writ should be granted in order to clarify the numerous conflicting opinions over what constitutes a service or facility under Sections 2 (e) and (d) of the Robinson-Patman Act; and to address the issue raised by the holding of the 4th Circuit that the furnishing of facilities or services on terms which are not proportional should be addressed under Section 2(a) of the Act, rather than 2(e). See, Petition for Writ of Certiorari at Appendix A, pages A17, 18.

I. THE PMPA CLAIM

The various Circuits have consistently held that PMPA's

principal concern is the protection of franchisees, and that as remedial legislation the Act must be given a liberal construction consistent with its goal of protecting franchisees. See, e.g., Barnes v. Gulf Oil, 824 F.2d. 300, 304 (4th Cir. 1987). This view is strongly supported by the legislative history of the Act:

> "It is apparent from the legislative history of the Act that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with petroleum retailers." Note, Judicial Interpretation of the

Petroleum Marketing Practices Act: Conflict and Diversity, 32 Emory L.J. 273 at 274 (hereinafter cited as "Note, supra, Emory L.J.").

The PMPA was the culmination of several years of hearings on the subject of gasoline marketing held by the House Committees on Interstate and Foreign Commerce; and Small Business, under the leadership of Chairman John Dingell, the primary author of the PMPA. See generally, Comment, Retail Gasoline Franchise Terminations and Nonrenewals Under Title One of the Petroleum Marketing Practices Act , 1980 Duke L.J. 522, 529 n.40 (hereinafter cited as "Comment")

Oil companies testified that

legislation was not needed, because their own economic interests provided a sufficient check on abusive conduct.

Prior to the passage of the Act, commentators rejected the oil companies arguments and concluded the typical oil franchise relationship was unfair to the franchisee:

> "In the nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short term contracts will not be renewed unless they submit to burdensome franchisor- imposed practices... It is generally

conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising"... Comment, supra, at 525, 526.

Thus , as held by the Third Circuit sitting en banc in Slatky v. Amoco Oil Corp.

"The very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline distributors that remedial legislation was unnecessary because the interests of distributions and franchisees were in harmony." 830 F.2d 476, 483.

In enacting the PMPA, Congress sought to preserve flexibility for franchisors to respond to changing market conditions. It was not the intent of Congress to allow the flexibility to subvert the primary purpose of the Act: franchise protection. As Chairman Dingell stated in bringing the bill before the House:

> " I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or non-renewal of a franchise are intentionally broad enough to provide franchisors the

flexibility which to meet changing consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections this legislation is intended to provide and to assure that this flexibility, does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms." ;123 Cong. Rec. p. 10383, April 5, 1977 (Statement of Rep. John Dingell).

Clearly, the remedial purpose of the PMPA requires that the Act be liberally construed, as recognized by

the Third, Sixth, and Seventh Circuits, who disagree with the intrepretation of the PMPA put forth by the Fourth Circuit in this case.

A. EVENTS RELEVANT TO THE FRANCHISE RELATIONSHIP, AND AS A RESULT OF WHICH TERMINATION OF THE FRANCHISE IS REASONABLE

The PMPA, 15 U.S.C. 2801 et. seq., prohibits termination of a franchise or non-renewal of a franchise relationship as a general rule. 15 USC 2801(a). See, Senate Report No. 95-731 reprinted in 1978 US Code Cong. & Admin. News 875. The Report further provides that "Exceptions to the rule against termination or non-renewal are provided for in section 102(b) of the

Act." 1978 U.S.Code.Cong. & Ad. News. @ 876.

Cardinal rules of statutory construction, as well as the legislative history and remedial intent of the PMPA dictate that these exceptions not be interpreted in a way that swallows up the rule against termination or non-renewal.

The exception at issue in this case is found at 15 U.S.C. 2802 (b)(2)(C): the occurrence of an event relevant to the franchise relationship as a result of which **termination of the franchise or non-renewal of the franchise relationship is reasonable.** As the highlighted language makes clear, the issue in construing the event exception is whether or not the

termination or non-renewal is objectively reasonable in light of all of the facts and circumstances. Marathon Petroleum Co. v. Pendleton, 889 F.2nd 1509 (6th Cir. 1989); cf. Darling v. Mobil Oil Co., 864 F.2d 981 (2nd Cir. 1989) (term "reasonable" under the PMPA means objective reasonableness under all of the facts and circumstances); Doeberiner v. Sohio Oil Co., 880 F.2d 1213, as amended 893 F.2d 1275 (11th Cir. 1989) (same- defines reasonable to mean " fair, just, moderate or proper, 893 F.2d at 1276).

Time and space limitations prevent us from providing a detailed recount of the legislative history of the "event' exception in this brief,

however, it should be noted that the "event" provision appeared in HR 13000, the original version of the PMPA in the 94th Congress.

The hearing records reveal that oil companies requested that Congress adopt an illustrative "laundry list" to provide some guidance to the courts, as well as to the industry, as to what might constitute such an event.

Congress adopted such an illustrative list, which appears at 15 U.S.C. 2802(c). It did not honor the request of the companies with respect to the "failure to pay sums due provision" in that they requested language stating that failure to pay in accordance with the terms of the

contract, as opposed to the failure to timely pay provision ultimately adopted, could, in some circumstances, constitute reasonable grounds for termination.

The Fourth Circuit adopted a per se termination rule, when one of the enumerated events occurs. The basis for this holding is the belief that the "language is sufficiently clear and not at odds with the legislative history".

The irreconcilable conflict between the Circuits on this "sufficiently clear" language is precisely what this Court alone can resolve. We believe that the intrepretation of the Third, Sixth and Seventh Circuits is in accord with the

language of the the statute, which clearly makes puts the overall reasonableness of the termination at issue ("event making termination reasonable") is the correct one, as opposed to that of the First, Second, and in this case, Fourth Circuits.

The Fourth Circuit stated that history of the statute supported its interpretation, but amazingly the opinion makes no reference to it ! The history reveals that while PMPA is a balanced statute, it is unequivocally balanced towards the franchisee, as discussed in detail, supra, and that the Act is given a liberal construction consistent with the primary goal of protecting franchisees.

The history of the event section undercuts not only the Fourth Circuit's opinion, but those of the Second and First Circuits as well.

The Senate Report alone contains considerable discussion of the event exception. With respect to the "failure to timely pay" exception it states:

> "Another enumerated event relates to the failure by the franchisee to pay to the franchisor all sums to which the franchisor is legally entitled. A standard of timely payment is utilized. **This standard is intended to permit evaluation of nonpayment or late payment**

in view of prevailing commercial or industry trade practices."

1978 U.S.Code Cong. and Ad.News at 896. Application of a per se rule prevents this evaluation from taking place, and would allow petroleum franchisors to terminate disfavored dealers in an arbitrary and discriminatory manner. Almost all oil companies have an established trade practice for handling dealer and distributors with financial problems. Evidence that an oil company treated a particular dealer in a manner inconsistent with its own established practices, or inconsistently with similarly situated dealers should be allowed to be evaluated by the trier

of fact, to determine whether the termination is in fact objectively reasonable. The 4th Circuit opinion throws out a long line of cases holding that retaliatory and discriminatory treatment are evils which the PMPA was designed to address, and that any presumption of reasonableness that arises as the result of the occurrence of an enumerated event is rebuttable. A number of these cases have been cited in the Petition, suffice it to say that the rejection by the Fourth Circuit of a long line of cases holding that such pretextual, arbritrary, and discriminatory treatment of dealers is indeed relevant to the analysis cries out for

review by this Court.

We would direct the Court's attention to a recent Committee Report issued by Chairman Dingell, the author of the PMPA, which contains the following discussion of the event section:

> "The occurrence of one of the events on this list is presumed to constitute reasonable grounds for termination, **but can be rebutted by a showing to the contrary. See, e.g., Sun Refining and Marketing Co. v. Rago, 741 F.2d 670 (3rd Cir. 1984)**." House Report #100-1000 (100th Congress, 1988 at p. 9,10)

Given the fact that the author of the PMPA, Chairman Dingell, cites the decision of the Third Circuit in Rago with approval, we believe that the per se termination rule is not in accord with the original intent of the Act.

The legislative history of other events, such as underlying leases also supports this view :

> "Among the enumerated events is the loss of the franchisor's right to grant continued possession of the premises under certain circumstances. Expiration of the underlying lease could occur under a variety of circumstances including, for example, a decision by the

franchisor not to exercise an option to renew the underlying lease. **However, it is not intended that the termination or non-renewal should be permitted based upon the expiration of a lease which does not evidence the existence of an arms length relationship between the parties and as a result of which no substantive change in control of the premises results."** 1978 U.S.Code.Cong. & Ad.News at 896.

Under this opinion, if the event of condemnation of even one square

inch of the station property occured (15 U.S.C. 2802 (c)(5)); the Fourth Circuit would allow termination of the franchise, whereas at least three others would not.

This is a serious issue affecting over 120,000 franchised locations nationwide, that should not be left in the present situation of irreconcilable conflict.

B. THE PRICE DISCRIMINATION CLAIMS

Although the case arises under Maryland law, the language of the that statute closely mirrors that of the Robinson-Patman Act, and the decision of the Fourth Circuit under review is based solely on the RPA. The Fourth Circuit plurality ruling on the

Maryland Act claim is an abomination, a ruling that would turn Wright Patman over in his grave, and has not a SHRED of support in the legislative history. With all due respect, the most charitable description we have heard of this aspect of the opinion is that it is "utterly divorced from economic reality." The 4th Circuit has engaged in precisely the type of judicial legislating this Court condemned in J. Truett Payne, by refusing to follow Congress' directive in section 2(e) of Robinson-Patman as to what constitutes a service or facility and creating a per se rule of its own, and then by holding that the form of discrimination at issue should be addressed solely under Section 2 (a).

The opinion states that " The leased premises here do not actively promote the resale of gasoline by Hinkleman to the retail consumer. Rather, the premises merely facilitate Hinkleman's resale of gasoline. As we have already stated, Robinson -Patman section 2 (e) only prohibits discrimination through services, like advertising or mechandising, that promote resale of a commodity." 962 F.2d 372, @ 378, reprinted in Petition for Certiorari, Appendix A, p. A16.

The plain language of the statute refers not only to "services" but also to "facilities", thus the Fourth Circuit has not only split with its sister circuits, See,

e.g., Centex- Winston Corp. v. Edward Hines Lumber Co. , 447 F.2d 585 (7th Cir. 1971); cert. den. 405 U.S. 921 (1972), it has also attempted to rewrite both the Robinson-Patman Act.

The distinction between "promoting" and "facilitating" resale of a commodity is nowhere to be found either in the Robinson-Patman Act or the Maryland statute, and in any event it is unworkable, and makes no economic sense.

In the gasoline retailing industry, it is **PATENT NONSENSE** to HOLD that a gas station and station design does not promote the sale of gasoline.

Oil companies, dealers and distributors (known as "jobbers") are

spending hundreds of millions of dollars on image programs, promoting uniform station appearance, color schemes, canopy and convenience store designs, auto service franchises and programs,pump shapes and designs, and otherwise upgrading stations all in an effort to SELL THE COMMODITY - GASOLINE. There are thousands of pages of recent Congressional testimony we could cite on this point.

The Petroleum Marketing Practices Act strongly supports this holding: not only is the concept of leased marketing premises an integral part of the Act; See, 15 U.S.C. 2801(9), the history shows us that "the franchise relationship in the petroleum industry is unusual, in fact perhaps unique, in

that the franchisor commonly not only grants a trademark license but often controls, and leases to the franchisee, the real estate premises used by the franchisee. In addition the franchisor almost always is the primary, even exclusive, supplier of the franchisee's principal sale item: motor fuel." 1978 U.S.Code.Cong.& Ad.News. at 875. It further provides that; "Therefore, the substantive provision of the title relating to the termination or non-renewal of the franchise relationship, may not be circumvented by a termination or non-renewal of the real estate lease or motor fuel supply agreement which thereby renders the trademark license valueless. Id. @ 888.

The Fourth Circuit supports its decree based on its concept of "consumer welfare" as the goal of the RPA, and its (mis)understanding of injury to competition under the Act.

The idea of "consumer welfare" (defined as eliminating conduct that reduces output) as the sole goal of the antitrust laws stems from Robert Bork's book: The Antitrust Paradox. This view of the goal of the antitrust laws has never been accepted by this Court or Congress, and is hotly disputed by most commentators who find wealth transfers from consumers to producers and other goals in the history of the Sherman and Clayton Acts.

Even Judge Bork acknowledges that

Robinson-Patman expressly includes the goal of "small business welfare": "The statute proceeds from the idea that price discrimination is a means of injuring competitors, usually small ones, and that injury to competitors results in injury to competition." Antitrust Paradox at 385. See, e.g., 80 Cong. Record 3113, "The more important concern is in injury to to the competitor who has suffered by the discrimination." (Statement of Sen. Logan, Senate Floor Manager of the Bill).

Indeed, even a cursory review of the legislative history of the Act supports the unbroken line of cases from FTC v. Morton Salt Co. 334 U.S. 37 (1948) through Texaco v. Hasbrouck

, 110 S.Ct. 2535 (1990) in holding that competitive injury is inferred from injury to a competitor, and that the Act was designed to preserve small businesses.

The Fourth Circuit's analysis of the history and purposes of the Robinson- Patman Act also conflict with the conclusions of other Circuits. See, e.g., Alan's of Atlanta v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) and J.F. Feeser v. Serv-A-Portion, 909 F.2d 1218 (3rd Cir., 1990).

In the absence of preemption, state statutes must be given effect. If the state decides a given practice harms competition, no Court cannot overrule the State based on its own

notions of what proper economic policy should be. The same is true of Congressional enactments, which this Court has repeatedly held with respect to not only the Robinson- Patman Act, but specifically with respect to Section 2 (e). F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 67,68. That is exactly what has happened here, and another reason why this Court should grant the writ.

The final issue upon which the petition should be granted is to determine whether the furnishing of a facility such as a gasoline station on proportionately unequal terms should be addressed under section 2 (a) of Robinson-Patman or Section 2 (e).

The Fourth Circuit held that "In

contrast, section 2(e) requires no showing of competitive injury. Behavior found to violate section 2 (e) is "illegal per se, irrespective of competitive impact, and without regard to statutory justification. Because application of a per se rule risks adverse consequences, we prefer to limit the scope of section 2 (e) to that necessary to fulfill the section's purposes. Other, nonpromotional forms of direct or indirect discrimination should be judged under the more flexible standards of section 2 (a) so that courts can protect procompetitive conduct from prosecution." 962 F.2d @ 379, Appendix A to Petition for Certiorari at A17, A18.

However noble the goal of the Fourth Circuit majority, they are acting contrary to the law, and that action should be reviewed by this Court.

The plain language of the statute does not even remotely support the majority opinion. As this held in Simplicitly Pattern:

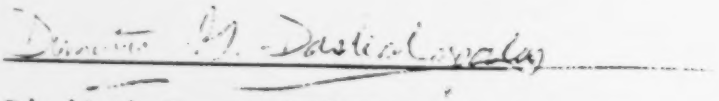
"We cannot supply what Congress has studiously omitted. Simplicity's arguemnts to the contrary are based essentially on the ground that it would be " bad law and bad economics" to make discriminations unlawful even where they may be accounted for by cost differentials or there is no competitive injury. Entirely aside from the fact that this Court is not

in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price discrimination and other discriminations differently is without a rational basis. In allowing a "cost justification defense" for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings." 360 U.S. 55, 67, 68.

The legislative history on this point in our judgment makes clear that 2 (e) should reach the type of

discrimination alleged herein, therefore Amici would urge the Court to grant the writ on this important issue of the reach of section 2 (e), as well as all other issues presented.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1992, I mailed copies of this Motion for Leave to File and Brief Amicus Curiae in Support of Petition for Certiorari to:

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MOTION FILED
NOV 23 1992

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN,

Petitioner,

V.

SHELL OIL COMPANY,

Respondent.

MOTION OF VIRGINIA GASOLINE MARKETERS & AUTOMOTIVE REPAIR ASSOCIATION, INC. FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MOTION FOR LEAVE TO FILE AMICUS BRIEF AND STATEMENT OF INTEREST

Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), hereby moves this Court for leave to file an amicus curiae brief in support of the Petition for a Writ of Certiorari filed herein. Leave is sought due to the paramount national significance of the issues presented to the members of state associations such as VGMARA, as well as to the motoring public.

VGMARA is the trade association representing Virginia's service station dealers, owner/operators of convenience stores and gasoline retail outlets, and owners of automotive repair facilities. The preponderance of its members are

franchised dealers of the major oil companies, and operate pursuant to franchise agreements covered by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. Section 2801, et seq.

VGMARA has been an active force at the state level in legislation concerning petroleum marketing and an active litigant in Federal Court on issues involving construction of the statute at issue. VGMARA believes that it is qualified to present to the Court the analysis and argument that would more fully develop the Court's understanding herein. VGMARA's concerns are necessarily broader than those of the parties, and only VGMARA can

adequately represent its members' interests.

The issues raised in this case are of grave concern to VGMARA. The proper interpretation of the PMPA is particularly important and VGMARA believes that the appellate court did not have before it the legislative history of the PMPA. This decision conflicts with previous decisions of the Fourth Circuit as well as other circuits and is contrary to the basic underlying tenant of the PMPA, franchisee protection from arbitrary and discriminatory franchise termination.

As of this writing Petitioner has given his consent to filing this motion. Respondent's consent has been sought and

as of this date, has not been given to VGMARA.

QUESTIONS PRESENTED

I. Does the federal Petroleum Marketing Practices Act permit inquiry into pretext and the reasonableness of a termination where, despite the franchisor's facial compliance with the termination provisions of the Act, the evidence suggests that the termination is ill motivated, arbitrary and discriminatory?

II. Is a leased service station a "service or facility" within the meaning of Section 2(e) of the Robinson Patman Act and Maryland's analog thereto?

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FRANCIS GEORGE HINKLEMAN

Petitioner

v.

SHELL OIL COMPANY

Respondent

AMICUS BRIEF OF VIRGINIA GASOLINE MARKETERS & AUTOMOTIVE REPAIR ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANALYSIS

Francis George Hinkleman ("Hinkleman") has petitioned this Court for a writ of certiorari to review the

judgment of the Court of Appeals for the Fourth Circuit which was entered on May 6, 1992, and the denial of petition for rehearing with suggestion for rehearing in banc, which was entered on July 28, 1992.

Amicus, Virginia Gasoline Marketers & Automotive Repair Association, Inc. ("VGMARA"), addresses herein only the first question presented in the petition filed herein, to-wit:

> "Does the federal Petroleum Marketing Practices Act permit inquiry into pretext and the reasonableness of a termination where, despite the franchisor's facial compliance with the termination provisions of the Act, the evidence suggests that the termination is ill motivated, arbitrary and discriminatory?"

STATEMENT OF THE CASE

Petitioner is a former franchisee of Respondent, Shell Oil Company ("Shell"),

who operated a Shell retail service station in Pasadena, Maryland. This case arose when Shell terminated Hinkleman's franchise because of his alleged "failure to pay in a timely manner when due all sums to which Shell was legally entitled."

A. **THE FOURTH CIRCUIT'S DECISION.**

The Fourth Circuit, in a per curium opinion, affirmed the district court's grant of summary judgment on the PMPA claim, adopting Shell's position that a termination for failure to timely pay is per se reasonable, and that "further inquiry into pretext is unnecessary".

Hinkleman thereafter petitioned for rehearing, with a suggestion for a rehearing en banc, which was denied. The Petition urges that a writ of

certiorari be granted to review the Fourth Circuit's action.

REASONS FOR GRANTING THE PETITION

I. THE PMPA CLAIM.

A. Introduction.

VGMARA strongly believes that review by this Court is vital in order to resolve a conflict among the Circuits on whether, and to what extent, Courts inquiry into the reasonableness of terminations under the PMPA "events" sections, 15 U.S.C. 2802(b)(2)(C) and 2802(c), should be permitted. The decision below widens the split of authority on that issue, but goes far beyond any other case that has prohibited such inquiry by precluding inquiry into pretext. By its holding, the Fourth Circuit has ignored the

PMPA's major underlying goal and purpose; namely to assure franchisee of an opportunity to challenge arbitrary and discriminatory franchise terminations. This decision has substantially eroded these protections afforded to such franchisees by PMPA. Review is necessary to restore the proper balance to the Act and to resolve the conflict on an issue that has occurred, and which will surely reoccur in the future.

The court below apparently did not consider the legislative history of PMPA, as other courts considering this issue have done, in arriving at its decision. A thorough analysis of PMPA and its legislative history, therefore, is critical to a proper analysis of this

issue.

B. The PMPA.

In 1978, Congress enacted Title I of the PMPA to protect franchisees from "arbitrary or discriminatory termination or nonrenewal of their franchises." Barnes v. Gulf Oil Corp., 795 F.2d 358, 360 (4th Cir. 1986). See also, S. Rep. No. 731, 95th Cong., 2d Sess. 15, reprinted in 1978 U.S. Code Cong. & Admin. News 873, 874 ("Senate Report"). In enacting PMPA, Congress was responding to evidence of a pattern of abuse by refiners. This is supported by the Act's legislative history:

> "It is apparent from the legislative history of the Act that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with

petroleum retailers." Note, Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity, 32 Emory L.J. 273 at 274.

PMPA was enacted following several years of study and hearings by Congress, and by Rep. John Dingell, the primary author of the Act. See generally, Comment, Retail Gasoline Franchise Terminations and Nonrenewals Under Title One of the Petroleum Marketing Practices Act, 1980 Duke L.J. 522, 529 n.40. Not surprisingly, the Act was bitterly opposed by the major oil companies who argued that such remedial legislation was not needed. Clearly, Congress felt differently:

> "The very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline distributors that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony."

Slatky v. Amoco Oil Company, 830 F.2d 476, 483.

By its enactment of PMPA, Congress sought to balance the competing interests of the parties and in so doing gave the oil companies some flexibility in its marketing decisions, including decisions to terminate franchises. However, it did not allow or envision such flexibility on the part of the oil companies to be used as a means of circumventing the overall purpose of the Act; that is, survival of the franchisee and protection from arbitrary and unreasonable franchise termination:

> "I believe that several important matters regarding this legislation should be appreciated. First, the grounds specified as justification for termination or non-renewal of a franchise are intentionally broad enough to provide franchisors the flexibility with which to meet changing consumer preferences. However, to assure that franchisees nevertheless receive the meaningful protections this legislation is intended to provide, and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very specific enforcement mechanisms."

123 Cong. Rec. p. 10383, April 5, 1977 (Statement of Rep. John Dingell).

The Fourth Circuit acknowledged this fact in Barnes v. Gulf Oil Corp., 824 F.2d at 304, 305 [PMPA injunction standard intentionally drawn to benefit small retailers].

Rep. Dingell made it clear that franchisee protection was the overriding

concern of Congress in its enactment of PMPA:

> "I want the record to show clearly so that it can be seen that this is a balanced piece of legislation, balanced towards the franchisees as opposed to the franchisors."

Hearings on HR 130, before the Committee on Interstate and Foreign Commerce (Energy and Power Subcommittee), 95th Congress, 1st Session at pp. 158, 226, Serial No. 95-51.

Courts have consistently considered the underlying purpose of PMPA as well as its legislative history in ruling on franchise terminations. The Act was intended to remedy the disparity of bargaining power between franchisors and franchisees, and to preserve "the competitive influece of independent

franchisees in the marketplace." Roberts v. Amoco Oil Company, 740 F.2d 602, 602 (8th Cir. 1984). As remedial legislation, it must be construed liberally, consistent with its primary goal of protecting franchisees. Humboldt v. Exxon Co., U.S.A., 695 F.2d 386, 389 (9th Cir. 1982).

PMPA seeks to achieve its goals by "specifically set[ting] forth the permissible grounds for termination or nonrenewal of franchise relationships, and bestow[ing] on federal courts jurisdiction to remedy violations of the Act." Doebereiner v. Sohio Oil Co., 880 F.2d, 329,332 (11th Cir. 1989), amended on den. of pet. for reh., 893 F.2d 1274 (11th Cir. 1990) ["reasonable" under PMPA means objective reasonableness

under all of the facts and circumstances. Reasonable defined to mean "fair, just, moderate or proper"]. Under the PMPA, the termination of a petroleum franchise is barred unless the termination meets specific statutory justifications. Darling v. Mobil Oil Corp., 864 F. 2d 981, 984 (2d Cir. 1989). As described in Bridges Enters. v. Exxon Co. U.S.A., 820 F.2d 123, 124 (5th Cir. 1987), "[t]he statute is exclusive: a franchisor may terminate or nonrenew a franchise only if its action is based on a permitted ground, and only if the stringent notification requirements of Section 2804 have been met." See also, Barnes v. Gulf Oil Corp., 795 F.2d at 361. To further its beneficent purposes, PMPA shifts the

burden of proof to the franchisor to show that the termination was in compliance with the Act. 15 U.S.C. 2805(c).

One of the grounds that PMPA recognizes as a basis for terminating a franchise is the "occurrence of an event which is relevant to the franchise relationship and as a result of which, termination of the franchise or nonrenewal of the franchise relationship is reasonable. . ." 15 U.S.C. 2802(b)(2)(C). Included as such an "event" is the "failure by the franchisee to pay in a timely manner when due all sums to which the franchisor is legally entitled." 15 U.S.C. 2802(c)(8). Any "failure" which is only "technical or unimportant to the

franchise relationship", or "any failure for a cause beyond the reasonable control of the franchisee," 15 U.S.C. 2801(13), is, however, excluded.

C. The Present Case.

In the present case, Shell relied upon Hinkleman's alleged "failure to pay timely" as the asserted ground for the termination. Shell presented evidence that Hinkleman had tendered several checks to Shell that had been returned due to insufficient funds, and that there had formerly been an outstanding balance on Hinkleman's trade account. Hinkleman presented evidence showing that any " failure" was only "technical or unimportant" because the checks were promptly replaced; because Shell had

previously ignored the outstanding balance on the trade account, despite Hinkleman's efforts to secure its resolution; and, because Shell was ignoring substantial outstanding balances owed by others. Moreover, Hinkleman presented evidence to show that his payments were nevertheless "timely" under the PMPA standard, despite the technical delays, because of Shell's own established practices with respect to payment. Additionally, however, Hinkleman presented substantial evidence that Shell's reliance upon the "failure to pay" ground was a pretext, and that Shell had arbitrarily and discriminatively singled Hinkleman out for disparate treatment. Hinkleman argued that the facts in the

record were sufficient to raise an inference of pretext so as to preclude the summary determination of the issue. Shell's failure to act on more egregious violations by others; Shell's termination of Hinkleman on the basis of several NSF checks that ordinarily would not be sufficient to warrant termination action; Shell's expressed dissatisfaction with Hinkleman for reasons unrelated to any payment problems; Shell's "ad hoc" approach to terminations; and, Shell's actions in holding two substantial checks longer than normal and depositing them on the same day, all suggested an improper motive according to Hinkleman.

The district court rejected Hinkleman's arguments, finding such

evidence insufficient to withstand Shell's summary judgment motion. Drawing a positive inference from Shell's ad hoc approach to terminations, as opposed to the negative inference drawn in analogous contexts, see, e.g., Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1011 (11th Cir. 1984) (selection processes which are conducted in an ad hoc or discretionary manner must be viewed with particular suspicion), the district court granted Shell summary judgment. On appeal, the Fourth Circuit adopted Shell's argument that the PMPA ground upon which Shell relied was per se reasonable under the statute, and that further inquiry into pretext was thus unnecessary.

In adopting its "per se" approach to the reasonableness of the termination where a 2802(b)(2)(C) and 2802(c) "event" is involved, the Fourth Circuit followed the approach of the First, Second and Eleventh Circuits. Those Courts had previously found that a "termination [for an "event"] is conclusively presumed to be reasonable as a matter of law," Desfosses v. Wallace Energy, Inc., 836 F.2d 22, 26 (1st Cir. 1987); that "a court need make no further inquiry as to the reasonableness of the termination," Russo v. Texaco, Inc., 808 F.2d 221, 225 (2d Cir. 1986); and, that the list of "events" under 2802(c) "provides twelve situations in which Congress has decided that termination of a franchise

agreement is reasonable," Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1573 (11th Cir. 1987), without the need for further inquiry.

The above approach is directly contrary to that taken by the Third, Sixth and Seventh Circuits, which have recognized that a 2802(b)(2)(c) and 2802(c) event should not be construed as "a per se termination rule favoring franchisors," Sun Refining and Marketing Co. v. Rago, 741 F.2d 670, 673 (3d Cir. 1984); that the Court "must scrutinize the reasonableness of terminations even when an event enumerated in Section 2802(c) has occurred," Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509, 1512 (6th Cir 1989); and, that "events in the nature of contract

violations must be assessed by an independent analysis of reasonableness and materiality," Brach v. Amoco Oil Co., 677 F.2d 1213, 1221 (7th Cir. 1982).

D. The Fourth Circuit's Extension of the Per Se Termination Rule.

The Fourth Circuit has, by its decision in this case, extended the "per se" rationale to a new extreme by precluding inquiry into pretext. By so holding, not only did the Court part company with the Circuits rejecting the "per se" approach, but it also deviated from every other Court which has considered the issue of pretext in the PMPA setting. This decision, if permitted to stand, will have the effect of allowing oil companies to continue a

pattern of abuse which the PMPA was enacted to prevent. An oil company is free to arbitrarily terminate a franchise in a discriminatory manner and so long as it facially complies with PMPA's requirements, it is free from scrutiny. This is troubling to VGMARA and to its members covered by PMPA.

In Brach v. Amoco Oil Company, supra, the Seventh Circuit recognized that even in the case of a nonrenewal based on a franchisor's business decision to nonrenew because of unprofitability under 15 U.S.C. 2802(b)(3)(D), "some analysis may be necessary to determine whether [the franchisor's decision] was nothing more

than a pretext for nonrenewal". 677 F.2d at 1222. In Valentine v. Mobil Oil Corp., 789 F.2d 1388, 1392 (9th Cir. 1986), the Ninth Circuit, considering a nonrenewal under 15 U.S.C. 2802(b)(3)(A) ("failure to agree" to changes in the franchise), stated that courts will not "second guess" business decisions of the franchisor "[s]o long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal . . . ." In Sandlin v. Texaco Refining and Marketing, Inc., 900 F.2d 1479 (10th Cir.), cert. denied, 111 S.Ct. 252 (1990), the Tenth Circuit quoted the above language from Valentine in recognizing that the franchisor may nonrenew for legitimate business reasons

recognized by the Act as long as there is no "discriminatory motive" or "pretext". Id. at 1482.

The district courts have likewise recognized that terminations must not be pretextual. In Gilderhus v. Amoco Oil Co., 470 F. Supp. 1302 (D. Minn. 1979), there was evidence presented that Amoco's termination was motivated by retaliatory considerations, and that it was simply looking for an excuse to terminate. In granting the dealer a preliminary injunction, the Court stated that such a termination would be invalid "since it would be contrary to the very purpose and policies of the [Act] to provide franchisees with meaningful protections from arbitrary and discriminatory terminations.'" 470 F.

Supp. at 1305. In a later hearing in the same case, the Court noted that "[a]llowing Amoco to effect what might in fact be proved to be a retaliatory termination while maintaining technical compliance with the Act would violate the spirit and intent of the Act." Gilderhus V. Amoco Oil Co., 1980-81 Trade Cas. (CCH), Para. 62,649 at 77,496 (D. Minn. 1980). See also, Brownstein v. Arco Petroleum Products Co., 604 F. Supp. 312, 315 (E.D.Pa. 1985) (Court emphasizes PMPA's concern over "pretextual nonrenewals"); Rogue Valley Stations, Inc. v. Birk Oil Co., 568 F. Supp. 337, 347-48 n. 6 (D.Or. 1983) (franchisor who uses expiration of underlying lease as a pretext for what is actually a retaliatory or

discriminatory termination might be found in violation of the PMPA); Exxon Corp. v. Miro, 555 F. Supp. 234, 237 (C.D. Cal. 1983) (same); Union Oil Co. of Calif. v. O'Riley, 276 Cal. Rptr. 483, 492 (Cal. App.2d Dist. 1990) (the termination was found to be in retaliation for O'Riley's complaints about various conditions. The Court found that "[t]his type of retaliatory termination is exactly the sort of conduct which Congress enacted the PMPA to prevent"). In all of these cases, the need for a second level analysis into pretext was recognized.

PMPA's legislative history, and in particular of the "event" section at issue here, undercuts the court's opinion. The Senate Report contains

extensive discussion of the event exception. With respect to the "failure to timely pay" exception it states:

> "Another enumerated event relates to the failure by the franchisee to pay to the franchisor all sums to which the franchisor is legally entitled. A standard of timely payment is utilized. This standard is intended to permit evaluation of nonpayment or late payment in view of prevailing commercial or industry trade practices."

1978 U. S. Code Cong. & Admin. News at 896. Application of the per se rule prevents this evaluation from taking place, and would allow an oil company to terminate disfavored dealers in an arbitrary and discriminatory manner. Almost all oil companies have an established trade practice for handling dealers and distributors with financial problems. Evidence that an oil company

treated a particular dealer in a manner inconsistent with its own established practices, or inconsistently with similarly situated dealers should be allowed to be evaluated by the trier of fact, to determine whether the termination is in fact objectively reasonable. Retaliatory and discriminatory treatment are evils which the PMPA was designed to address and any presumption of reasonableness that arises as the result of the occurrence of an enumerated event is rebuttable.

E. Inquiry into Pretext is Necessary Whenever the Statute Seeks to Prohibit Arbitrary and Discriminatory Conduct.

The need for inquiry into pretext is readily apparent where "arbitrary and discriminatory conduct" is the evil

sought to be remedied. In other statutes, the purpose of which is to prevent discriminatory conduct, inquiry into pretext is recognized as essential, despite the absence of language mandating such inquiry in the acts themselves. Common sense requires that such an inquiry be performed. For example, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., a federal statute prohibiting discriminatory practices in employment, this Court, despite the absence of any mention of a pretext inquiry in the Act, has repeatedly held that such an inquiry is necessary. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973) ("Title VII does not . . . permit petitioner to use respondent's

conduct as a pretext for [prohibited discrimination]"); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-57 (1981) ("[P]laintiff must . . . have an opportunity to prove . . . that the legitimate reasons offered by the defendant were a pretext for discrimination."). Likewise, in discrimination suits under 42 U.S.C. 1981, inquiry into pretext is recognized as an essential question, although no mention is made of this inquiry in the legislation. Patterson v. McLean Credit Union, 491 U.S. 164, 187 ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms.").

The implicit reasoning behind all of these mandated inquiries into pretext is the same -- such inquiry is necessary in order to effectively prevent the evil sought to be remedied. Here, allowing franchisor to rely upon a statutory ground for termination, but precluding inquiry into pretext, will undermine PMPA's protections and the statutory objectives which Congress sought to achieve. Only by allowing such inquiry can a statute aimed at preventing arbitrary and discriminatory conduct be given its intended effect.

While the Fourth Circuit has acknowledged the remedial nature of PMPA, (for example the Court held that PMPA's injunctive standard is a very liberal standard that was intentionally

crafted to benefit small dealers such as Hinkleman, Barnes v. Gulf, 824 F.2d 300, 304 (4th Cir. 1987), the Fourth Circuit's holding in the present case is apparently being read in a way that is contradictory to the Barnes premise. Hinkleman is also being read in a way that is apparently contrary to the holdings of other circuits. At best there is some confusion as to how to harmonize the authorities.

While Hinkleman is being read to establish a per se rule that technical compliance with PMPA precludes any inquiry into surrounding circumstances, such a reading would foreclose taking cognizance of equitable considerations which may otherwise be outcome determinative. That would be contrary to

Congressional intent. For example, at the hearings on PMPA, the principal sponsor, Chairman Dingell stated:

> "I want the record to show clearly so that it can be seen that this is a balanced piece of legislation, balanced toward the franchisees as opposed to the franchisors."

Hearings on HR 130, Before the Committee on Interstate and Foreign Commerce (Energy and Power Subcommittee), 95th Congress, 1st Session at 158, Serial No. 95-51. In fact other Circuits have made clear that for a termination or non-renewal to be "reasonable" under the specified grounds in PMPA means taking cognizance of surrounding circumstances. See Darling v. Mobil, 864 F 2d 981 (2d Cir. 1989) (term "reasonable" under the PMPA means objective reasonableness

under all the facts and circumstances); Doebereiner v. Sohio, 880 F 2d. 1213, as amended 893 F 2d 1275 (11th Cir 1989); Eden v Amoco, 741 F. Supp 1192 (D. Md. 1990) (term "reasonable" means objective reasonableness under all facts and circumstances). Of particular clarity on this point is the analysis of the Tenth Circuit in Filiaga v. Chevron, No 89-4098 (10th Cir July 20, 1990) Unpublished opinion, where the Court reasons:

> "The legislative history supports the view that equitable estoppel should be considered even in the face of compliance with the Act. . . ."

The legislative history goes on to state:

> "It is clear that no single statutory principle would be flexible enough to deal with so wide

> a range of potential conflicts. . . . [PMPA] leaves to the Courts the task of resorting to traditional principals of equity to maximize attainment of competing statutory objectives . . ."

[Senate Report No. 731, supra]

> "We are persuaded that compliance with the provisions of the PMPA was not intended by Congress to insulate the franchisor from equitable considerations and therefore hold that the district court must examine Filiaga's claim of equitable estoppel."

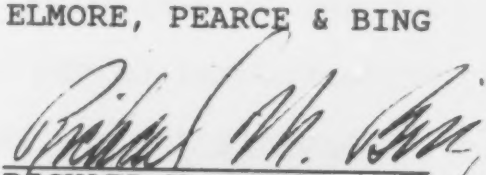
Filiaga, supra at 5, 6.

CONCLUSION

For the foregoing reasons Amicus VGMARA respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

ELMORE, PEARCE & BING



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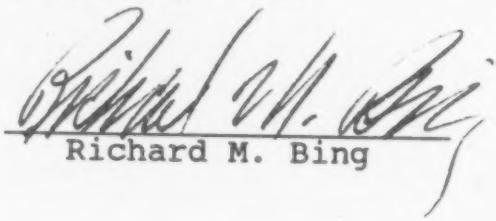
CERTIFICATE

I hereby certify that a true copy of the foregoing Motion of Virginia Gasoline Marketers & Automotive Repair Association, Inc. for Leave to file Amicus Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was mailed, first class and postage prepaid, to Harry G. Storm, Esq., Abrams, West & Storm, P.C., 4550 Montgomery Avenue, Suite 760N, Bethesda, Maryland 20814, Counsel of Record for Petitioner Francis G. Hinkleman, and to M. Albert Figinski, Esq., Weinberg & Green, 100 S. Charles Street, Baltimore,

Maryland 21201, Counsel of Record for Respondent Shell Oil Company, on this 23rd day of November, 1992.



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